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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1965

No. 36

DUKE LEE LEWIS, PETITIONER,

vs.

UNITED STATES.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR CERTIORARI FILED DECEMBER 9, 1965

CERTIORARI GRANTED JANUARY 31, 1966

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 811

DUKE LEE LEWIS, PETITIONER,

vs.

UNITED STATES.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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IN THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 6610

DUKE LEE LEWIS, a/k/a LEE D. LEWIS,
Defendant, Appellant,

v.

UNITED STATES OF AMERICA, Appellee.

[fol. 1]

Appellant's Appendix

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
No. 65-130-F Crim.

THE UNITED STATES,

v.

DUKE LEE LEWIS a/k/a LEE D. LEWIS.

RELEVANT DOCKET ENTRIES

1965			
Apr.	23	1	Indictment returned
	26	2	Warrant for arrest issued
	28		FORD, D.J. Defendant appears before the Court without counsel—Court enters plea of not guilty—ordered to recognize in the sum of $5,000.00 with security—Recog. on file
	28		Clerk's notes filed in Court

1965			
	30		Warrant for arrest of defendant returned by Marshal, with service, dated April 27, 1965, filed
May	24	3	Appearance of Maynard G. Evans, Esq., Messrs. Klarfeld, Evans & Klarfeld for defendant filed
June	1	4	Motion to suppress evidence filed by defendant
	2	5	Defendant's brief in support of his motion to suppress evidence, filed
	3	6	Defendant's affidavit in support of his motion to suppress evidence, filed
[fol. 2]			
	7		FORD, D.J. Hearing on motion to suppress evidence filed by defendant, advisement.
	7		FORD, D.J. On defendant's motion to suppress evidence motion denied. Notices 6/8/65
	14	7	Court reporter's transcript of proceedings filed
	18		FORD, D.J. Waiver of Jury Trial filed in open Court, signed by the defendant, defendant's counsel, counsel for the Government and approved by the Court—defendant set to the bar to be tried without jury—trial begins —evidence—motion of the defendant to suppress evidence, renewed—defendant's affidavit in support of his motion to suppress evidence, filed—Government and defendant rests—motion denied—Court finds the defendant guilty on both counts—bail continued—disposition 7/12/65 at 11:00 A.M.,
	18		Clerk's notes filed in Court
	22		Receipt for money, evidence or other property—Matthew Seifer, Custodian of evidence, Boston, Mass., filed

1965	
July 12	FORD, D.J. Defendant sentenced to be imprisoned for a period of Five (5) years on Count I of the Indictment, and Five (5) years on Count II of the Indictment, said Five (5) year sentence on Count II, to run concurrently with the Five (5) year sentence imposed on Count I. Sentence stayed ten (10) days pending appeal.
14	Judgment and commitment issued—copies to U.S. Marshal, Asst. U.S. Atty. E. L. Lee, [fol. 3] Deft. and Atty. for deft. Probation Office 7/14/65
21	Deft's Notice of Appeal filed. Copy to U.S. Atty.
21	Statement of docket entries and copy of N.A. delivered to Court of Appeals.
Aug. 6	Original pleadings and exhibits delivered to Court of Appeals.

IN THE UNITED STATES DISTRICT COURT

INDICTMENT—Returned April 23, 1965

The grand jury charges:

Count I

Duke Lee Lewis, a/k/a Lee D. Lewis, of Boston in the District of Massachusetts, on or about December 3, 1964, at Boston in said District, did transfer 31.16 grams, more or less, of marihuana, not in pursuance of a written order of the person to whom such marihuana was transferred, on a form issued in blank for that purpose by the Secretary of the Treasury or his delegate; in violation of Title 26, United States Code, Section 4742(a).

Count II

Duke Lee Lewis, a/k/a Lee D. Lewis, of Boston in the District of Massachusetts, on or about December 17, 1964, at Boston in said District, did transfer 40.34 grams, more or less, of marihuana not in pursuance of a written order of the person to whom such marihuana was transferred, on a form issued in blank for that purpose by the Secretary of the Treasury or his delegate; in violation of Title 26, United States Code, Section 4742(a).

[fol. 4]

IN THE UNITED STATES DISTRICT COURT

MOTION OF THE DEFENDANT TO SUPPRESS EVIDENCE —Filed June 1, 1965

Now comes the Defendant, Duke Lee Lewis, a/k/a Lee D. Lewis and moves this Honorable Court to suppress any acts, admissions, and/or confessions made by him to agents of the Federal Bureau of Investigation prior to his indictment in the instant case and also moves to suppress in evidence any materials of any kind whatsoever, if any there be, taken or acquired from the home of the Defendant, known and numbered as 354 Walnut Avenue in that part of Boston known as Roxbury.

As grounds thereof the Defendant states that said evidence was procured under the following conditions:

1. The property was illegally seized from the Defendant, from his home and without a search warrant, said home being illegally entered by trick or deception.

2. The property was acquired illegally by means of deception from the Defendant by means of trickery and without a search warrant, from his home.

3. The property was illegally acquired by means of solicitation and enticement from the Defendant, from his home and without a search warrant.

4. The Defendant's constitutional rights were violated.

5. In order to properly seize or acquire the property used in connection with the indictment against the Defendant, the agent of the Federal Bureau of Investigation should have acquired a search warrant therefore, where the property was taken or acquired from the Defendant, and from his home.

6. The mere fact that an agent from the Federal Bureau of Investigation who disguises himself or poses as an ordinary citizen for the purpose of gaining entry into the home of the Defendant for the purposes of acquiring evidence against him and seizing property, does not excuse the [fol. 5] necessity for obtaining a search warrant.

By his Attorneys, Klarfeld, Evans & Klarfeld, By: S. Myron Klarfeld.

IN THE UNITED STATES DISTRICT COURT

DEFENDANT'S AFFIDAVIT IN SUPPORT OF HIS MOTION TO SUPPRESS EVIDENCE—Filed June 3, 1965

Now comes the Defendant in the above entitled matter and in support of his motion to suppress evidence states that the evidence he wishes to suppress is 31.16 grams, more or less, of marihuana acquired and taken from his home on or about December 3, 1964 and 40.34 grams, more or less, of marihuana acquired and taken from his home on or about December 17, 1964, and any and all admissions or utterances made in connection with the alleged transfer which may have taken place in or about his home on said December 3, 1964 and December 17, 1964. The Defendant reserves his rights under the Fifth Amendment of the Constitution notwithstanding this Affidavit.

Subscribed and sworn to under the pains and penalties of perjury this 3d day of June, 1965.

Duke Lee Lewis

June 3, 1965

I hereby certify that I have this day served a copy of this motion on Mr. Lee of the U. S. Attorney's office, 1107 Federal Building, Boston, Massachusetts.

Signed under the pains and penalties of perjury,

S. Myron Klarfeld

Motion denied
FORD, J.
June 7 '65

[fol. 6]

IN THE UNITED STATES DISTRICT COURT

Transcript of Evidence—June 7, 1965

HEARING ON MOTION BEFORE FORD, D.J.

Boston, Massachusetts

Edward R. Cass, Sworn.

Direct examination.

By Mr. Klarfeld:

Q. Sir, will you tell us your name, please?
A. Yes, Edward R. Cass.
Q. And you are an agent of the Federal Bureau of Investigation?
A. No, sir, I am a federal narcotic agent.
Q. Whether or not you are the officer who on December 3, 1964 and December 17, 1964 obtained a quantity of marihuana from the defendant Mr. Lewis?
A. The question is am I? Yes, sir, I am.

The Court. The offense is laid on December 3, 1964 and then you answered on two occasions.
Mr. Lee. I believe Count 2—
The Court. Transferred to you on these two dates?
The Witness. Correct, sir.
The Court. What were they?

The Witness. December 3 and December 17.

The Court. This December 17 date does not refer to this marihuana you are talking about.

Mr. Lee. No, your Honor, that is Count 2 of the indictment.

The Court. All right. Go ahead, please.

Q. Mr. Cass, at some time prior to December of 1964 were you assigned by your superior to conduct an investigation for narcotics in violation of the narcotics laws in the Roxbury area of Boston?

A. Yes, I was.

Q. At the time of this assignment were you assigned the [fol. 7] name of the defendant as a possible suspect?

A. No, he was not assigned as a specific violator. I—

The Court. That is the answer. Next question.

Q. At some time during your investigation prior to the arrest of Mr. Lewis did the defendant Mr. Lewis become a suspect?

A. Yes, he did.

Q. Can you tell us when in time that was, Mr. Cass?

A. Yes, sir. It began in 1963.

Q. In 1963?

A. Yes, sir.

Q. On or about Thursday, December 3—

The Court. Were you on this investigation in 1963, did you say?

The Witness. I was aware of him as a suspect as far back as 1963, your Honor.

Q. On or about Thursday, December 3d, 1964, as alleged in the indictment, did you communicate by telephone with the defendant prior to going to his home?

A. On December 3d?

Q. Yes.

A. Yes, sir, I did.

The Court. What did you do? Communicate by telephone?

The Witness. With Mr. Lewis.

The Court. All right.

Q. Was the purpose of your telephone call on this date, sir, to inquire about the purchase of a quantity of marihuana?

A. It was.

Q. On said date, December 3d and December 17th, 1964, Mr. Cass, did you pose as someone other than the federal officer that you are?

A. I did.

Q. And whether or not you represented yourself to the defendant on those occasions that you were one Pollock, operating a bar and grille, perhaps, in Rhode Island?

A. That's correct.

The Court. A bar?

The Witness. Yes, sir.

[fol. 8] Q. Did you inform the defendant on either the occasion of December 3d, 1964 or December 17th, 1964, when you spoke to him on the telephone or at his home, that you were a federal officer?

A. No, I did not.

Q. When you went to the defendant's home on December 3d and December 17th, 1964, Mr. Cass, did you have a search warrant for that purpose?

A. I did not.

Q. At the time you went to the defendant's home on December 3d, 1964, did you suspect, from information you had received prior thereto or based on your own personal knowledge or otherwise, that a transaction might take place at the home of the defendant so far as the transfer of marihuana is concerned?

A. I did.

Q. When you went to the home of the defendant on December 3d and on December 17th, Mr. Cass, did you not go there for the purpose of obtaining narcotics from him?

A. I did.

Q. On either occasion of December 3d or December 17th, Mr. Cass, did you identify yourself to the defendant as a federal agent?

A. I did not.

Q. On or about Thursday, December 17th, 1964, prior to going to the home of the defendant did you communicate with him by telephone?

A. I did.

Q. And was this communication also concerning the possibility of procuring some marihuana from the defendant?

A. It was.

Q. When you went to the defendant's home the second time, Mr. Cass, on December 17th, 1964, did you not have enough evidence to arrest him at that particular time and charge him with the same crime for which he is charged today?

A. I did.

Q. When you went to the defendant's home the second time had you not gone far enough with your investigation necessary to arrest the defendant and have him charged [fol. 9] with the particular crime for which he has been charged?

A. It is a matter of opinion. At that point I felt that the case required further investigation.

Q. Just my prior question, Mr. Cass, I asked whether or not when you went the second time you had sufficient evidence to arrest him and you said yes?

A. That's correct.

Q. Now I ask you, when you went the second time had you gone as far—

The Court. There is something in the answer to that question that might involve a question of law for the Court. He might think he had and I might think he did not have. The question as to whether it was a false arrest, whether or not the Court, after inquiring into the information, would decide the point. You are asking him for conclusions of law.

Mr. Klarfeld. I have no intention of doing that, your Honor. I am very sorry.

Q. When you went to the defendant's home the second time on December 17th, 1964 did you advise him of his right to have counsel before he answered any questions or entered into any conversation with you?

A. On the 17th?

Q. Yes.

A. No, sir, I did not.

Q. And on either visit, either the visit of December 3d or December 17th, did you advise the defendant of any of his constitutional rights insofar as they related to the matters with which he is charged today?

A. I did not.

Q. When, to the best of your recollection, after December 17th, 1964 did you arrest the defendant?

A. On the 27th of April, 1965.

Mr. Klarfeld. Thank you very much, Mr. Cass.

The Witness. Yes, sir.

The Court. Do you want to ask any questions?

Mr. Lee. Yes, your Honor.

[fol. 10] Cross examination.

By Mr. Lee:

Q. Mr. Cass, on December 3d, 1964 I believe you stated you had a telephone conversation with the defendant; is that correct?

A. That's correct.

Q. And did you go to his house subsequent to that conversation?

A. I did.

Q. What in fact was said by you and by the defendant in the telephone conversation that preceded your visit to his house?

Mr. Klarfeld. I pray your Honor's judgment.

The Court. You object on what ground?

Mr. Klarfeld. Your Honor, I don't think this is going to be germane to the purposes of the motion here. We are discussing today the entry into the man's house.

The Court. I am sure of that but I am going to allow the question.

Mr. Klarfeld. Will your Honor note my objection?

The Court. Yes. Go ahead. What did he say to you and what did you say to him?

The Witness. I called Lewis at his home and a man answered, said, "Hello."

And I said, "Duke?"

And Duke said, "Yeah."

And I said, "This is Jimmy the Pollack. A friend of ours told me you got some pretty good grass."

And he said, "Yes." He told me, "I believe, Jimmy, I can take care of you."

I said, "Fine. I want about five bags."

He said, "Do you know where I live?"

I said, "No." He gave me his address as 354 Walnut Avenue and asked if I knew how to get there. I told him I wasn't sure. He gave me directions to come to his home and he said to come right over. That was the end of the conversation.

The Court. This was December of 1964, that talk?

[fol. 11] The Witness. That is correct, sir, December 3d.

Q. Directing your attention to December 17, 1964, did you have another conversation with the defendant at that time?

A. I did.

Q. What was said by you and by the defendant on that occasion?

A. The telephone conversation?

Q. Yes.

A. I called him and said, "Duke this is Pollack." I said, "I would like to get about six bags."

He said, "Fine, come on right over."

Q. Did you thereafter go to the defendant's home?

A. I did.

The Court. Was it on December 3d that you got this 31.16 grams? Or do you remember how much you got on that occasion?

The Witness. I bought five bags the first occasion for $50. They average about five grams per bag. Probably about 30 grams.

Q. At the time on December 17, 1964 when you went to the defendant's home, is that the occasion on which you

obtained 40 grams more or less of marihuana from the defendant?

A. Yes, sir.

Q. I believe you testified on direct examination that your purpose in visiting the defendant was to purchase marihuana; is correct?

A. Yes, sir.

Q. Did you attempt, at the time you visited Mr. Lewis, to induce him by any threat or coercion to sell marihuana to you?

Mr. Klarfeld. I pray your Honor's judgment.

The Court. That is a conclusion. He would have to decide what coercion was. Get into all the conversation and let the Court determine that issue.

Q. At the time you visited Mr. Lewis on December 3d—

The Court. What did you say to him when you went up there to his home on December 3d and got these five bags? What did he say to you?

[fol. 12] The Witness. I knocked on the door and Duke Lewis opened the door. I said, "Duke?"

He said, "Yeah."

I said, "I'm Jim."

He said, "Come on in." He said, "What is that nick name they call you?"

I said, "Pollack."

He said, "Okay, I got your stuff out on the porch."

We sat down in his living room. I said, "Is this stuff any good?"

He said, "Yes, Jimmy, my stuff is always nice."

I told him if I was satisfied with the quality of the marihuana I would do business with him on a regular basis but I would want a little break on the price.

He said, "What do you have in mind?"

I said, "I want a discount if I am going to buy regularly in quantity."

He said, "These first five bags will cost you $50. If you like it, next week I'll throw in an extra bag and let you have six bags for $50.

Q. Subsequent to this conversation what did you do?

A. He said, "Come on, I'll show you where the stuff is."

We walked down the hall to the front door and he started to open the door and an automobile drove by and the headlights shine on the porch. He shut the door until the car drove by and he opened the door again and he pointed over to, as you come out the door, to the left on the front porch.

He said, "See that package over there—"

Sorry, I forgot to tell you I paid him $50 before we left the living room.

He pointed to a package, a newspaper advertisement wrapped around a brown paper bag that had the five bags of Marihuana inside the bag. He pointed to it. I picked it up.

I said, "Okay, I'll see you in about a week."

[fol. 13] He said, "Okay." And that was the end of the conversation.

Q. On December 17, 1964 when you, pursuant to your telephone conversation, visited the defendant at his home did you have a conversation with him there?

A. Yes, sir, I did.

Q. Will you tell the Court what you said to him and he said to you?

A. I knocked on the door. He opened the door and we exchanged greetings and he said, "I've got your stuff right here."

I said, "I've got to use your bathroom."

He pointed it out. I walked down the hall through the apartment, went to the bathroom and walked back past the bedroom and living room doors that were open and I rejoined him at the front door.

He said, "You left your motor running."

I said, "There's a friend of mine waiting in the car."

He said, "Okay."

He handed me the package containing the six bags of marihuana and I paid him $50 and told him I would call him again in about a week.

Q. On either of these occasions, December 3 and December 17, 1964, did Mr. Lewis say anything to you that indicated he was reluctant to sell you the marihuana?

[Mr. Klarfeld rises.]

The Court. That calls for a conclusion again.

Mr. Lee. I withdraw the question.

Q. I believe you testified that you also saw the defendant on a third occasion and that was April 27, 1965?

[Mr. Klarfeld rises.]

A. That's correct.

Mr. Klarfeld. I pray your Honor's judgment to this.

The Court. This is the other marihuana in the garage, is it?

[fol. 14] Mr. Lee. I am not speaking about the marihuana, I am speaking about a conversation.

The Court. Go ahead. I don't know what you hope to prove.

Mr. Lee. Your Honor, I will withdraw the line of inquiry.

The Court. All right. The question is was there any violation of the Fourth Amendment with respect to this transfer we are talking about on December 3, 1964. That's all.

Mr. Lee. Your Honor, I have no further questions.

Redirect examination.

By Mr. Klarfeld:

Q. Mr. Cass, on both occasions, the 17th—December 3d and December 17th, you made these telephone calls to the defendant's home before going?

A. That's correct.

Q. And on neither occasion did you advise the defendant that if he permitted you to come onto his premises he might be waiving any of his constitutional rights?

A. That's correct, I did not.

Mr. Klarfeld. Thank you. That's all I have, your Honor.

IN THE UNITED STATES DISTRICT COURT

RULING OF COURT ON MOTION TO SUPPRESS EVIDENCE —June 7, 1965

Take notice that in the above-entitled case Judge Ford has made at Boston, Mass., on June 7, 1965 the following notation on the following motion:

"June 7, 1965 On defendant's motion to suppress evidence, motion denied. /s/ Ford, D.J."

Date June 8, 1965

Paul V. Traverse, Clerk. By Grace V. Flood, Deputy Clerk.

[fol. 15]

IN THE UNITED STATES DISTRICT COURT

Excerpt From Transcript of Trial—July 12, 1965

RENEWAL OF MOTION TO SUPPRESS EVIDENCE AND DENIAL THEREOF

The Court. Now, what I am presented with here is a renewal of the motion of the defendant to suppress evidence; right?

Mr. Klarfeld. Yes, your Honor.

The Court. That motion will be denied, Mr. Counsel.

There is one observation I want to make before I make the final finding. It relates here, before the grounds were assigned, that certain material was taken or acquired, as I read it, from the home of the defendant at 354 Walnut Avenue. Of course with respect to December 17th there was a manual transfer, according to the evidence, of the marihuana, and the other occasion it was practically, and I find that there was a manual transfer because of the circumstances in which it appeared where the marihuana that was admitted in evidence was located and Agent Cass was directed to pick it up. That the Court finds the equivalent, of course, to a manual transfer. In other words noth-

ing was taken or seized by the agent of the government. In both cases it was transferred voluntarily, the Court finds, by the defendant.

Mr. Klarfeld. Would the record reflect my request, to protect the rights of my client, on your Honor's ruling [and] in denying the motion to suppress the evidence?

The Court. Yes. There is no objection to that, of course.

Mr. Klarfeld. [And] my objection to your Honor's reference to the transfer as a manual transfer.

The Court. Yes. I will make a note of the objection to that. That is my finding with respect to that.

• • • • • • •

[fol. 16]

IN THE UNITED STATES DISTRICT COURT

JUDGMENT—July 12, 1965

On this 12th day of July, 1965 came the attorney for the government and the defendant appeared in person and by counsel,

It Is Adjudged that the defendant has been convicted upon his plea of not guilty and a finding of guilty by the Court of two offenses in violation of Title 26, USC Section 4742(a), in that he did transfer 31.16 grams, more or less, of marihuana (Count I), and 40.34 grams, more or less, of marihuana, (Count II), not in pursuance of a written order of the persons to whom such marihuana was transferred, on a form issued in blank for that purpose by the Secretary of the Treasury or his delegate as charged in counts 1 and 2 of the indictment and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Five (5)

years on Count 1 of the Indictment, and Five (5) years on Count II of the Indictment, said Five (5) year sentence on Count II, to run concurrently with the Five (5) year sentence imposed on Count I.

It is Adjudged that

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

Francis J. W. Ford, United States District Judge.

[fol. 17]

IN THE UNITED STATES DISTRICT COURT

NOTICE OF APPEAL—Filed July 21, 1965

Name and address of Appellant: Duke Lee Lewis, a/k/a Lee D. Lewis, 354 Walnut Avenue, Roxbury, Massachusetts.

Name and address of Appellant's attorney: Klarfeld, Evans & Klarfeld, 20 Pemberton Square, Boston, Massachusetts.

Offence: It Is Adjudged that the defendant has been convicted upon his plea of not guilty and a finding of guilty by the Court of two offenses in violation of Title 26, USC Section 4742(a), in that he did transfer 31.16 grams, more or less of marihuana (Count I) and 40.34 grams, more or less, of marihuana, (Count II), not in pursuance of a written order of the persons to whom such marihuana was transferred, on a form issued in blank for that purpose by the Secretary of the Treasury or his delegate, as charged in counts 1 and 2 of the indictment and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized

representative for imprisonment for a period of Five (5) years on Count I of the Indictment, and Five (5) years on Count II of the Indictment, said Five (5) year sentence on Count II, to run concurrently with the Five (5) year sentence imposed on Count I.

The defendant is presently on bail.

I, the above named Appellant Duke Lee Lewis, a/k/a Lee D. Lewis appeal to the United States Court of Appeals [fol. 18] for the District of Massachusetts from the above stated judgment.

For the Appellant by his duly authorized agent and attorneys,

Klarfeld, Evans & Klarfeld, By: S. Myron Klarfeld.

[fol. 27]

Appellee's Appendix

IN THE UNITED STATES DISTRICT COURT

Stenographic Transcript of Trial—June 18, 1965

APPEARANCES:

Edward J. Lee, Esq., for the government.

S. Myron Klarfeld, Esq., for the defendant.

Court Room No. Three
Federal Building, Boston

• • • • • • •

The Clerk: United States v. Duke Lee Lewis. You are now set to the bar to be tried.

Mr. Lee: Your Honor, may I request that the waiver be read into the record? I understand the defendant is considering an appeal of his motion.

The Court: It is filed in the case. That is sufficient.

Mr. Lee: Does your Honor wish to hear an opening on the part of the government?

The Court: No. I know the charge and we have discussed it the other day and I am ready. Put in your testimony. Have you something?

Mr. Klarfeld: Yes, your Honor, in accordance with our discussion I would like to represent my motion to suppress and I have it and the affidavit.

The Court: So as to protect your rights you object and I will overrule it. Also make an objection when the evidence is adduced.

Mr. Klarfeld: The reason, sir, I presented it—

The Court: Your rights will be fully protected, too.

Mr. Klarfeld: Thank you very much.

• • • • • • •

[fol. 39] Edward R. Cass, Sworn.

Direct examination.

By Mr. Lee:

Q. Will you state your name, please?

A. Edward R. Cass.

Q. Your business address, Mr. Cass?

A. 1425 Post Office Building, Boston, Massachusetts.

Q. Are you employed?

A. Yes, sir.

Q. By whom are you employed?

A. The Federal Bureau of Narcotics, United States Treasury Department.

Q. Were you employed by that bureau in December of 1964?

A. Yes, sir.

Q. In the course of your official duties did you have occasion to be in Boston at that time?

A. I did.

Q. At some time prior to December 3, 1964 did you have occasion—

The Court: Are you from Boston originally?

The Witness: Yes, sir.

The Court: Where were you working before you came to Boston on this case?

The Witness: I had been in Boston since June of 1963.
The Court: Go ahead.

Q. At some time prior to December 3d, 1964 did you have occasion to receive some funds in the course of your official duties?

A. Yes, I did.

Q. What were those funds?

A. They were referred to as official advance Funds, funds that are issued to narcotic agents for the purchase of narcotics evidence.

Q. Did you have such funds in your possession on December 3, 1964?

A. I did.

Q. Again directing your attention to that date, December 3, 1964, did you have occasion then on that day to make a telephone call?

A. I did.

Q. Approximately what time did you make this call?

A. About 11 p.m.

Q. What was the number called?

A. HI 5-3641.

[fol. 40] Q. To whom was that number, HI 5-3641, listed, if you know?

A. Lee Duke Lewis at 354 Walnut Avenue.

Q. Where is 354 Walnut Avenue?

A. In Boston, the Roxbury district.

Q. At the time you dialed that number did you say something?

A. I did.

Q. What did you say, what did you first say, the first thing you said?

A. I said, "Is Duke there?"

Q. Did anyone answer your call?

A. Yes.

Q. What did that person say?

A. He said, "This is Duke."

Q. Did you have any further conversation with the person who answered at that time?

A. I did.

Q. Was there anyone else present when you made this call?

A. Yes.

Q. Who was that person?

A. Narcotics Agent Richard Smith.

Q. Was Mr. Smith doing anything at the time that you could observe?

A. He was.

Q. What was he doing?

A. He was monitoring the telephone conversation by placing his ear next to the receiver.

Q. Is it your testimony, then, that the receiver was between your ear and Mr. Smith's ear on this occasion?

A. That's right.

Q. After this call did you do anything?

A. Yes.

Q. What did you do?

A. I drove to 354 Walnut Avenue.

The Court: Was that the only conversation you had, "This is Duke," and then you drove?

The Witness: No, sir, there was more conversation.

Mr. Lee: I was bringing it in later but I will bring it out now.

The Court: Do it your own way. It will be brought out by defense, anyway. You try your own case, Mr. Lee.

Mr. Lee: Thank you, your Honor.

[fol. 41] Q. Is it your testimony you drove to 354 Walnut Avenue?

A. Yes, sir.

Q. What did you do when you arrived at 354 Walnut?

A. I got out of my car and knocked at the door of the first floor apartment.

Q. Did someone answer your knock?

A. Yes, sir.

Q. Who was that person? Was it a man?

A. It was a man.

Q. Do you see that person present in the court this morning?

A. Yes, I do.

Q. Will you point him out, please?

A. It was Mr. Lewis, sitting behind the brass rail to my right.

Q. Is that Mr. Duke Lee Lewis, also known as Lee D. Lewis?

A. Yes.

Mr. Lee: Your Honor, may the record reflect the witness properly identified the defendant?

The Court: I will leave out the word "properly."

Mr. Lee: Excuse me. Has identified the defendant.

Q. Did you have any conversation with Mr. Lewis at that time?

A. Yes, I did.

Q. First of all, before you answer that, at the time Mr. Lewis answered the door did you say anything to him?

The Court: What was the conversation at that point? What did Mr. Lewis say to you and you say to Mr. Lewis?

The Witness: I knocked on the door and Mr. Lewis opened the door and I said, "Duke?"

He said, "Yeah, come on in."

I went into the apartment, into a hallway. He closed the door behind me and I said, "I'm Jimmy."

He said, "What is that nickname they call you?" And I said, "Pollack."

He said, "Oh, yeah, come on."

I followed Duke down the hall into his living room and he told me to have a seat. I sat down and he asked me where I was from and I told him Rhode Island.

[fol. 42] And he said, "What do you do?"

I said, "I've got a saloon down there."

And Duke said he had a saloon here in town, too.

And he said, "Your stuff is out on the porch, Pollack."

And I said, "Is it nice stuff, Duke? Is it clean and manicured?"

Duke said, "My stuff is always nice."

And I said, "If I'm satisfied I might become a regular customer but I would want a little break."

And he said, "What do you have in mind?"

And I said, "I want a discount if I come back regularly."

And he said, "This first five bags will cost you $50 but if you come back I'll throw in another bag and let you have six bags for $50."

And I said okay and I paid him $50 and he said, "I'll show you where your stuff is."

And I followed him back down the hallway to the front door and he opened the door and he said, "It is down at the end of the porch."

At that point a car came by and he shut the door and said, "Wait until this car goes by."

Then he opened the door and pointed to the end of the porch and said it was wrapped in the newspaper and he stood in the doorway while I walked to the end of the porch and picked up the package. There were a couple of advertisements from a discount store, Sherbros, wrapped around a white paper bag and I picked the package up and walked back to the center of the porch, to the front door, and told Duke, "I'll see you in about a week."

He said, "Any time."

And I walked down the steps, got into my car and drove away.

Q. At the time you said you gave Mr. Lewis $50 at 354 Walnut Street, in the apartment, what denominations were [fol. 43] those bills, if you remember?

A. I think it was a 20, and three tens.

Q. Directing your attention to your earlier testimony, Mr. Cass, when you said you placed the telephone call on that same date to HI 5-3641, the phone you knew to be listed to Mr. Lewis, and a voice answered, "Yes, this is Duke," when you arrived at 354 Walnut Avenue and after the conversation you had with the defendant, were you then able to recognize the voice who answered your earlier phone call?

A. Yes, I was.

Q. And whose voice did you recognize that to be?

A. Duke Lewis.

Q. Can you relate now what you said to Mr. Lewis and he said to you in the earlier phone call?

A. Yes, I can.

Q. By the way, Mr. Cass, what time did you place that phone call?

A. At about 11 p.m.

Q. What time was it when you arrived at 354 Walnut Street?

A. Between 11.15 and 11.30.

Q. Would you relate the conversation in the earlier phone call, Mr. Cass?

A. Yes. I said, "Duke?"

And he said, "This is Duke."

And I said, "My name is Jimmy Pollack and a friend of ours told me you have some pretty good grass."

And he said, "Yes, he told me about you, Pollack. Yes. I can take care of you."

I said, "I want to pick up about five bags."

And he said, "Do you know where I live?"

And I said, "No."

And he gave me his address, he said, "I live at 354 Walnut Avenue."

And he asked if I knew how to get there and I said no and he gave me directions, told me how to get there from where I was calling. And I said—I acknowledged the directions and he said, "Okay, come on right over, it should take you about 15 minutes."

[fol. 44] Q. How long have you been a narcotics agent?

A. Approximately 13 years.

Q. Based on your experience as an agent are you able to state what is meant by the term "grass"?

A. Yes, sir, grass is a slang term, a street term for marihuana.

Q. At the time you testified you were at 354 Walnut Avenue and during the conversation in which you paid Mr. Lewis $50 and you subsequently obtained a package from him, from his porch, did you tender to Mr. Lewis a written order form on an order form issued by the Secretary of the Treasury authorizing the transfer of marihuana?

Mr. Klarfeld: I will stipulate he didn't do it, your Honor.

The Court: What is that?

Mr. Klarfeld: I will stipulate that the defendant did not.

The Court: The stipulation is that no order form was given.

Mr. Lee: Do you so stipulate, that no order form was given?

Mr. Klarfeld: Yes, your Honor.

The Court: You got no order form to give him, did you?

The Witness: No, sir.

The Court: All right.

Q. Mr. Cass, after you obtained the package wrapped in newspaper from Mr. Lewis at 354 Walnut Avenue, what did you next do?

A. I got into my car and drove to Howard Johnson's stand where I met Agent Smith and I examined the contents of the package. I found that inside the newspaper wrapping was a white paper bag and in the paper bag were five envelopes and I examined the contents of the envelopes in the presence of Agent Smith and we both initialed each article of the container, the envelopes, the newspapers, [fol. 45] and the bag, and I drove to the Federal Narcotics Bureau where, in the presence of Agent Smith, I locked the entire exhibit in a safe.

Q. Now, Mr. Cass, did there come a time when the package, the newspaper advertisements and the paper bag were removed from that safe?

A. Yes, sir.

Q. When was that?

A. The following day, December 4, in the presence of Agent Smith I removed the exhibit from the safe, weighed the contents of each of the envelopes and sealed the entire exhibit in a lock seal envelope and, with Agent Smith, I delivered the envelope to the United States chemist in Boston.

Q. Was that on the same date, the delivery to the United States chemist?

A. Yes, sir, the same date that I weighed and sealed it.

Mr. Klarfeld: Your Honor, I think I can stipulate again that the exhibits that have been heretofore referred to, iden-

tified by Mr. Kravitz, will be similarly identified by Agent Cass.

The Court: Then you stipulate that the packages that have been referred to in the previous testimony were contained in these envelopes. Do you need anything further?

Mr. Lee: No, your Honor. Just an identification or stipulation—

The Court: You can mark them all as exhibits.

Mr. Lee: I have them already marked, your Honor.

The Court: No, you haven't.

Mr. Lee: For identification, your Honor. I stand corrected.

The Court: There is a difference between an exhibit and an exhibit for identification. Give them to the Clerk and he will tell you what to do about them. They are now admitted in evidence and now we call them exhibits. It is an important distinction. Now they are in evidence.

[fol. 46] Mr. Lee: I was about to offer them, your Honor.

[Government's Exhibits 1, 2, 3 and 4 for Identification received in evidence.]

Mr. Klarfeld: Will the record reflect my objection to it being offered into evidence?

The Court: Yes. Counsel for defense objects to the admission of this evidence in this case.

Q. Mr. Cass, did there come a time when you placed another call to HI 5-3641?

A. Yes, sir.

Q. When was that?

A. On December 17, 1964.

Q. Approximately what time on December 17th, 1964?

A. A little past midnight, about 12.15 a.m.

Q. Did someone answer your call?

A. Yes, sir.

Q. Did you recognize the voice of the person who answered?

A. I did.

Q. Who was that person?

A. Duke Lewis.

Q. Was there a conversation?

A. Yes.

Q. Will you tell the Court what you said to Mr. Lewis and what he said to you on that occasion?

A. Yes, sir. I said, "Duke?"

He said, "Yes."

I said, "This is Pollack. I want to pick up six of those bags for $50."

He said, "Okay, I can take care of you. Come on right over."

Q. After this conversation did you do anything?

A. Yes, sir.

Q. What did you do?

A. I drove to 354 Walnut with Agent Smith, parked my car in front of the house and knocked on the door and Duke opened the door and I told him I wanted to use his bathroom and he told me where it was, at the far end of the house, and I walked through the house and went into the bathroom, came back through the house, rejoined Duke at the front door.

He said, "I've got your stuff right here."

[fol. 47] And I said, "Is it as good as the last stuff?"

And he said, "My stuff is always good."

And I paid him $50 and he opened the door. He said, "You left your motor running."

And I told him that there was a friend of mine waiting in the car, that he is okay.

And he said, "Okay, I'll see you later."

And I left the house—

The Court: No, no. "I have your stuff right here," and you paid him $50. What did he do?

The Witness: I'm sorry. He handed me a brown paper bag fastened with a rubber band, and then I paid him $50.

I left the house and got back in my car and, with Agent Smith, I drove to the Federal Narcotics Bureau and examined the contents of the paper bag, found six manila envelopes. I examined the contents of the envelopes and we both initialed all the containers, the envelopes and the paper bag and I locked the entire exhibit in a safe at the Narcotics Bureau.

Q. Mr. Cass, did there come a time when those six packages and the brown paper bag with the rubber band were taken from the safe at the Narcotics office?

A. Yes, sir, on the same date, in the presence of Agent Smith, I removed the exhibit from the safe, removed the contents from the envelopes, weighed them and sealed them in an evidence envelope which was sealed by me in the presence of Smith and we both signed the envelope and on that same date I delivered it to the United States chemist in Boston.

Q. Mr. Cass, directing your attention to the conversation on the telephone prior to your visit to 354 Walnut Avenue December 16, 1964, was there anyone present during the conversation?

A. Yes, sir, Agent Smith monitored the call by placing his ear next to the receiver.

Q. At the time when you were in Mr. Lewis' apartment at 354 Walnut Avenue and you gave him $50 and he gave [fol. 48] you six envelopes, did you at that time give him a written order on a form authorized by the Secretary of the Treasury—

Mr. Klarfeld: I will stipulate there was no order, your Honor.

Q. During the conversation in the apartment, Mr. Cass, did you say anything with respect to the quality of the marihuana which you received on December 3d, 1964?

A. I referred to it, yes, sir.

Q. What did you say?

A. I asked him—this is on the 17th—I asked him if this stuff, referring to the marihuana I bought on that date, was as good as the last stuff.

Q. Did Mr. Lewis reply to your comment on this occasion?

A. Yes, sir, he did.

Q. What did he say?

A. He said, "My stuff is always good."

Mr. Lee: I have no further questions of this witness, your Honor.

The Court: Do you want to inquire, Mr. Counsel?

Cross examination.

By Mr. Klarfeld:

XQ. Mr. Cass, prior to December 3, 1964, when had you commenced your investigation in this particular area so far as it relates to the defendant?

A. In 1963.

XQ. Can you give us a month?

A. It would be the latter part of 1963. I don't believe I can pin it down. It would be sometime from July on.

XQ. And when you commenced your investigation in the general area of the defendant's residence, would it be proper to say that you assumed the identity of Jim the Pollack as early as December of 1963?

A. No, sir.

XQ. When after December of 1963 can you place it, then, that you assumed this particular identity?

A. December of 1964.

XQ. December of 1964?

A. Yes, sir.

[fol. 49] XQ. And do I understand you correctly that it was in December of 1964 that you assumed this identity so far as the investigation in the general area for narcotics is concerned?

A. I'm afraid I misunderstood your question.

XQ. Well, sometime in December of 1963, Mr. Cass, you were assigned to this area for the purpose of conducting an investigation for narcotics by a supervisor?

A. No, that is not correct, either.

XQ. Well, at some time—

The Court: Why don't you ask him when and then he can answer it. When were you assigned to this area, if you were? He can always say no, when you talk about a specific date.

XQ. When you were assigned to investigate narcotics activities in this area?

A. In the area of Boston? In June of 1963.

XQ. And at sometime prior to making the telephone conversation of December 3d to the defendant Lewis, you had become acquainted with a friend of his?

A. That's correct.

The Court: Become acquainted with whom?

Mr. Klarfeld: A friend of the defendant's.

XQ. Can you tell us his name?

A. Yes. Richard Gold.

XQ. Did you, at some time after meeting Richard Gold, ascertain that he was a friend of the defendant, Mr. Lewis?

A. Yes, I did.

XQ. Was it through Richard Gold that you made your contact with the defendant Lewis, or did you use the name Richie to refer to Richard Gold in your conversation with him of December 3d?

A. No.

XQ. When you spoke with the defendant on December 3d, was there some conversation about Richie, meaning Richard Gold?

A. No.

Mr. Klarfeld: May I have just a moment, your Honor?

[A brief pause.]

[fol. 50] XQ. Previously you were asked the conversation you had with the defendant on December 3d and I believe you testified yourself, after Duke answered the telephone on December 3d, you said, "Duke?"

And Duke said, "Yes."

You said, "This is Jimmy the Pollack. A friend of ours told me you got some pretty good grass."

Is that, in substance, what the conversation was?

A. Yes, sir, that's correct.

XQ. Was that friend to whom you referred Richie Gold?

A. Yes, sir.

XQ. So that you did, then, make your contact with the defendant through this Richie Gold?

The Court: That asks for a conclusion.

XQ. Well, then, was it Richard Gold that put you in touch with the defendant?

A. I put myself in touch with the defendant.

The Court: That is another conclusion you asked. In order to get at these conclusions, you might ask some detail, and so forth. He said he put himself in touch with the defendant.

XQ. Well, then, it is correct that this friend, this mutual friend that you referred to, is Richard Gold?

A. That's correct.

XQ. Referring to Richard Gold, how long had you been acquainted with him prior to making your contact with the defendant? Just roughly.

A. Oh, at least six months.

XQ. Did he also know you as the Pollack or Pollack?

A. Yes, he did.

The Court: What was that question?

XQ. Did he also know Agent Cass to be Pollack, by that identity.

A. Yes.

XQ. And whether or not, Mr. Cass, you inquired of Mr. Gold if he could put you in touch with somebody from whom you could procure marihuana?

[fol. 51] Mr. Lee: Your Honor, I object. I don't see the relevancy.

The Court: Yes or no.

A. Yes, I did.

The Court: There is nothing wrong with that. The government uses informers to detect criminals and those in illegal enterprises, without question.

XQ. Is that how you had the occasion to call the defendant Lewis?

A. Yes.

XQ. Mr. Cass, at any time prior to your conversation with the defendant on December 3d and up to and including the time you arrested him, did you inform the defendant that you were a federal officer?

A. No, sir.

XQ. And on either occasion of December 3d or December 17th did you have a search warrant to enter the premises at 354 Walnut Avenue, the home of the defendant?

A. I did not.

XQ. And on either occasion, December 3d or December 17th, Mr. Cass, did you, prior to gaining entrance to the home of the defendant, advise him of his constitutional rights insofar as any waiver of his rights is concerned?

A. No, sir.

Mr. Lee: Your Honor, may the question be specific?

The Court: That's all right. He did not. Go ahead. These questions will be more pertinent after an arrest but not before, these questions he is asking now.

Mr. Lee: Yes, your Honor. I am just trying to get him to identify the right that he is seeking to question the witness about.

The Court: Those questions don't mean a thing in the light of the circumstances because Lewis wasn't under arrest.

XQ. On either occasion, Mr. Cass—

The Court: We don't get to Escobedo yet, do we?

Mr. Klarfeld: No, your Honor.

[fol. 52] The Court: Lewis wasn't under arrest when these various talks were had with him with respect to procuring this marihuana.

XQ. In any event, Mr. Cass, you did not advise him on either December 3d—

The Court: That's right, he did not.

Mr. Klarfeld: All right.

XQ. Your purpose in making the telephone call, Mr. Cass, on December 3d and on December 17th, was to secure the purchase of marihuana from the defendant?

A. It was to investigate an alleged violation of the narcotics laws and the purchase of drugs was one avenue of investigation. That wasn't the sole and specific—

XQ. But part of your purpose in calling him was to see if you could purchase narcotics from the defendant?

A. It was to present him with an opportunity if it seemed appropriate, yes.

The Court: Talking about warning of constitutional rights when these purchases were made, that would lead to an absurd situation. If he told Lewis, "You don't have to say anything or give me anything unless you want to," I wonder whether the agent would get anywhere at that point.

Mr. Klarfeld: I agree with your Honor.

The Court: You must agree because it is perfectly obvious.

Mr. Klarfeld: Yes, your Honor. I don't wish to make that contention.

The Court: I was thinking that would be absurd, if an agent goes around telling his name and he says, "I am an agent of the Internal Revenue Service. I want to buy 50 packages of marihuana," would he ever get any?

Mr. Klarfeld: Thank you, your Honor.

XQ. Mr. Cass, it is correct to say, then, that your phone calls and your visits to the home of the defendant were at [fol. 53] least in anticipation of acquiring marihuana?

A. It was to investigate the possibility and the acquiring of marihuana was one possible result of my inquiry and investigation, yes, sir.

XQ. That is why you went there, to see if you could get some?

A. I went there to investigate if there was a possible narcotics violation and in the course of the conversation I might, especially through conversation or observe marihuana on the premises, and if I did I might find it appropriate to attempt to get the evidence of the sale.

The Court: He asked—I think I will let it stand. You asked him why he went there.

XQ. Your telephone conversation, Mr. Cass, was about purchasing grass, as you call it?

A. No. Initially I said—

XQ. If your answer is no, please stop there because that is all I asked for.

A. I can't answer that question yes or no.

XQ. All right. When you called him on the telephone on December 3d, 1964, did you say to him, "This is Jimmy the Pollack. A friend of ours told me you got some pretty good grass"?

A. Yes, sir, that's what I said.

XQ. By grass, did you refer to marihuana?

A. I did.

XQ. Then you did call and ask him about marihuana?

A. That's right.

The Court: There is no question about it. It is perfectly obvious.

XQ. When you went to his home, you went there in anticipation of purchasing marihuana as a result of this phone call?

A. I would have to answer the same way. This was one possibility that occurred to me. It was not the only one.

The Court: There was a possibility he would be able to purchase marihuana. It is obvious. Nothing wrong with that.

[fol. 54] Mr. Klarfeld: No, your Honor. May I try one more time?

XQ. When you went to the home of the defendant on December 3d and December 17th, did you not go there for the purpose of obtaining narcotics from him?

A. This was one possibility. My prime purpose was to investigate.

The Court: Yes. It is perfectly obvious.

XQ. Is your answer yes?

A. My answer isn't yes.

XQ. Is your answer no?

A. No, sir. I am trying to answer your question.

The Court: You may qualify it. You would give the same answer.

XQ. I want to show you a page, Mr. Cass—

The Court: Wait a minute, Mr. Cass, counsel has a right to ask you—

XQ. I am going to show you a document—

The Court: That is a hearing on the motion to suppress?
Mr. Klarfeld: Yes, sir.

XQ. "When you went to the home of the defendant on December 3d and on December 17th, Mr. Cass, did you go there for the purpose of obtaining narcotics from him—" meaning the defendant, and what is your answer, please?
A. The answer was, "I did."

The Court: That was one of your purposes, at least, was it not?
The Witness: Yes, sir.

XQ. That answer was correct, was it not?
A. It was not complete.
XQ. Was it correct?

The Court: As far as it went, he says. It was not complete.

A. As far as it went it was correct but it wasn't complete.
XQ. You didn't go there to buy tea, did you?
A. That was one possibility that occurred to me.

[fol. 55] The Court: Don't quibble over it. He went there to buy grass and he bought it. No question about it.

XQ. When you went the second time, on December 17th, Mr. Cass, did you, on December 17th, have enough evidence to arrest the defendant at that particular time and charge him with the same crime for which he is charged here today?

Mr. Lee: I object.
The Court: Strike it out. He wouldn't know whether he had enough evidence and it is not up to him to make a decision.
Mr. Klarfeld: On December 17th, your Honor. This is the second time.

The Court: He doesn't decide whether or not there was enough evidence. That is up to the United States Commissioner. He does not have to answer a question like that.

Mr. Klarfeld: He did before, your Honor.

The Court: The question is, and the facts and so forth show that he had enough evidence. You can argue that way.

Mr. Klarfeld: I don't think I have anything else, your Honor.

The Court: Step down.

Mr. Lee: May I ask two questions, your Honor?

The Court: Yes, indeed.

Redirect examination.

By Mr. Lee:

Q. I believe you testified on direct examination that prior to your visit to Mr. Lewis on December 3d, 1964, you had a conversation with Mr. Gold. Then I believe defense counsel asked you if that was the occasion for your visit to Mr. Lewis. Mr. Cass, prior to December 3d, 1964, had you received any information from any source other than Mr. Gold indicating the possibility that the defendant—

[Mr. Klarfeld rises.]

[fol. 56] The Court: We won't go into that. Strike it out. If Gold turned out to be an informer, he has a perfect right to use an informer.

Mr. Lee: Yes, your Honor.

The Court: Were you here at the charge yesterday in the Sagansky case?

Mr. Lee: Yes, your Honor.

The Court: You heard all I had to say. There is no question about that.

Mr. Lee: Your Honor, earlier I was under the assumption that you had admitted Government's Exhibits 5, 6, 7 and 8. These—

The Court: They were all marked as exhibits. The defense counsel said there were no objections. Were they all marked?

The Clerk: No, your Honor, only the first ones.

Mr. Lee: May 5, 6, 7 and 8 be admitted, your Honor?

The Court: Certain of them have reference to the first count and the remainder have a reference to the second count.

Mr. Lee: Yes, your Honor, 5, 6, 7 and 8 refer to the second count.

The Court: They may be marked as exhibits.

Mr. Klarfeld: I have no objection to them being marked. The only objection I had was when he offered them for admission.

Mr. Lee: I am offering them now.

Mr. Klarfeld: I will object to them as being offered.

The Court: We were talking about the admissibility. You object to that, and properly so, and your objection is noted in the record. You are objecting to preserve his rights in the court up above, if he goes there.

[Government's Exhibits Nos. 5, 6, 7 and 8 for Identification received in evidence.]

Mr. Klarfeld: And my objection, for the record.

[fol. 57] Mr. Lee: I have no further questions of this witness, your Honor.

The Court: Step down.

Mr. Lee: Your Honor, may we approach the bench?

The Court: Yes, come up.

[Conference at the bench.]

The Court: Come up, Mr. Smith.

RICHARD G. SMITH, Sworn.

The Court: Take the stand, Mr. Smith. Your statement is that what he would testify would be corroborative of what the agent already has testified to?

Mr. Lee: Your Honor, Mr. Smith will testify to the same—

The Court: What is his name and address, first?

Direct examination.

By Mr. Lee:

Q. Will you state your name, please?

A. Richard G. Smith, 1423 Federal Building, Boston, Massachusetts.

Q. What is your employment, Mr. Smith?

A. Narcotics agent by the United States Treasury Department, Bureau of Narcotics.

Q. Were you present on December 3—first of all, do you know Mr. Cass?

A. Yes.

Q. Who is he?

A. An agent for the Bureau of Narcotics.

Q. Were you present on December 3, 1964 when Mr. Cass placed a telephone call to HI 5-3641?

A. Yes, sir, I was.

The Court: And what Mr. Cass testified to here as to the conversation over the telephone on that date and on December 17th, 1964, would you corroborate those?

The Witness: Yes, I would, your Honor.

The Court: He is turned over now to the defendant if he wishes to cross-examine.

Mr. Klarfeld: No questions, your Honor.

[fol. 58] The Court: That is, when you make a statement that the witness is merely corroborative of what went before, defense should always have the opportunity to cross-examine him if he wishes. Your statement, "It is merely corroborative, may it please the Court" and have him sworn and I turn him over to defense for cross-examination.

Ninety-nine times out of a hundred the defense will not cross-examine but at times they do. That is the purpose of corroboration and turning him over and that is done here and counsel, Mr. Klarfeld, says he waives or does not desire to cross-examine the witness and consequently, Mr. Smith, you may step down.

BOTH SIDES REST

Mr. Lee: Your Honor, I have no further evidence. The government rests.

The Court: Now, Mr. Klarfeld.

Mr. Klarfeld: The defendant will rest, your Honor.

The Court: Now, what I am presented with here is a renewal of the motion of the defendant to suppress evidence; right?

Mr. Klarfeld: Yes, your Honor.

The Court: That motion will be denied, Mr. Counsel.

There is one observation I want to make before I make the final finding. It relates here, before the grounds were assigned, that certain material was taken or acquired, as I read it, from the home of the defendant at 354 Walnut Avenue. Of course with respect to December 17th there was a manual transfer, according to the evidence, of the marihuana, and the other occasion it was practically, and I find that there was a manual transfer because of the circumstances in which it appeared where the marihuana that was admitted in evidence was located and Agent Cass was directed to pick it up. That the Court finds the equivalent, of course, to a manual transfer. In other words nothing was taken or seized by the agent of the government. In [fol. 59] both cases it was transferred voluntarily, the Count finds, by the defendant.

Mr. Klarfeld: Would the record reflect my request, to protect the rights of my client, on your Honor's ruling in denying the motion to suppress the evidence?

The Court: Yes. There is no objection to that, of course.

Mr. Klarfeld: In my objection to your Honor's reference to the transfer as a manual transfer.

The Court: Yes. I will make a note of the objection to that. That is my finding with respect to that.

Government rests, and do you intend to present any evidence, Mr. Klarfeld?

Mr. Klarfeld: No, I do not.

The Court: Then you rest your case?

Mr. Klarfeld: I do.

COURT'S FINDING

The Court: The Court, on the evidence presented here, finds the offenses laid down in Counts 1 and 2 of the indictment have been proved beyond a reasonable doubt and defendant—

Mr. Lee: Your Honor, may I approach the bench?

The Court: Go ahead, if you want to say something.

[Conference at the bench.]

The Court: I find the defendant guilty on both counts.

[Conference at the bench.]

The Court: Same bail. Disposition July 12th, Same bail until July 12th.

[fol. 60]

IN THE UNITED STATES COURT OF APPEALS

MINUTE ENTRY OF ARGUMENT AND SUBMISSION

On November 2, 1965, this cause came on to be heard and was fully heard by the Court, Honorable Bailey Aldrich, Chief Judge, and Honorable William H. Hastie (by designation) and Honorable Edward M. McEntee, Circuit Judges, sitting.

[fol. 61]

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

No. 6610.

DUKE LEE LEWIS, a/k/a LEE D. LEWIS,
defendant, appellant,

v.

UNITED STATES OF AMERICA, appellee.

Appeal from the United States District Court for the District of Massachusetts.

Before ALDRICH, *Chief Judge,* HASTIE* and MCENTEE, *Circuit Judges.*

S. Myron Klarfeld, for appellant.

Edward J. Lee, Assistant U. S. Attorney, with whom *W. Arthur Garrity, Jr.,* United States Attorney, was on brief, for appellee.

OPINION OF THE COURT—November 10, 1965

PER CURIAM. Defendant, convicted of selling marihuana to a government agent who had misrepresented his identity, claims an unlawful search and seizure because, thus misled by the agent, he invited him to his home and there made the sales. The happy days for law violators that this claim would produce are not to be. This is not a case of a government agent gaining access for an apparently proper purpose in order to seize surreptitiously evidence of a prior crime, *Gouled* v. *United States,* 1921, 255 U.S. 298, but is one in which the agent was invited for precisely the [fol. 62] purpose for which he went. Short of entrapment,

---

*Sitting by designation.

not here maintainable, defendant can no more assert that he would not have opened the door to the agent than he can assert that he would not have made the sale. His reliance upon *Escobedo* v. *United States*, 1964, 378 U.S. 478, is quite misplaced. *United States* v. *Pasquinzo*, 6 Cir., 1964, 334 F.2d 74.

Affirmed.

IN THE UNITED STATES COURT OF APPEALS

JUDGMENT—November 10, 1965

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the District Court is affirmed.

By the Court:

Roger A. Stinchfield, Clerk.

Enter: Aldrich, Ch. J.

[fol. 63] Thereafter, on November 12, 1965, mandate was stayed.

[fol. 64] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 65]

SUPREME COURT OF THE UNITED STATES

No. 811—October Term, 1965

DUKE LEE LEWIS, Petitioner,

v.

UNITED STATES

ORDER ALLOWING CERTIORARI—January 31, 1966

The petition herein for a writ of certiorari to the United States Court of Appeals for the First Circuit is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Office-Supreme Court, U.S.
FILED
DEC 9 1965
JOHN F. DAVIS, CLERK

Supreme Court of the United States.

#36

OCTOBER TERM, 1965.

No. [redacted]

DUKE LEE LEWIS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

S. MYRON KLARFELD,
20 Pemberton Square,
Boston 8, Massachusetts,
Counsel for Petitioner.

ADDISON C. GETCHELL & SON, INC., LAW PRINTERS, BOSTON.

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Supreme Court of the United States.

OCTOBER TERM, 1965.

No.

DUKE LEE LEWIS,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

Petitioner, Duke Lee Lewis, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit entered in the above case on November 10, 1965, affirming the judgment of the District Court wherein the petitioner was convicted of selling marihuana to a federal agent in the petitioner's *home,* to which the federal officer (in disguise) gained entrance by means of stealth and deception, *without a search warrant* and for the *purpose* of soliciting a crime and obtaining evidence from one suspected of a crime.

Opinion Below.

No opinion was rendered in the District Court and the brief opinion of the United States Court of Appeals for the First Circuit is printed in the Appendix hereto.

Jurisdiction.

The judgment of the Court of Appeals for the First Circuit was entered on November 10, 1965, and the jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented.

1. Can a federal officer avoid the necessity of obtaining a search warrant and gain entrance to the *home* of one suspected of a crime by disguising himself and gaining entrance by means of stealth, fraud and deception for the *purpose* of soliciting a crime and obtaining evidence to be used against the owner?
2. Is the Fourth Amendment to the Constitution of the United States violated when a federal officer, without a search warrant, disguises himself and gains entrance to the *home* of one suspected of a crime by means of stealth, fraud and deception for the purpose of soliciting a crime and obtaining evidence and does so?
3. Should the petitioner's motion to suppress evidence have been allowed?

Constitutional Provisions Involved.

The Fourth Amendment to the Constitution provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Statement of Case.

At the trial the evidence showed that a federal narcotics agent, by prior arrangements and by posing as a restaurant operator from Rhode Island, gained entrance to the *home* of the petitioner on two separate occasions in December of 1964 for the express *purpose* of purchasing a quantity of marihuana; that purchases were made in the petitioner's *home* by the agent, who did not have a search warrant; that the agent went to the home of the petitioner anticipating and for the purpose of making a purchase, and after the agent had sufficient reasons and time (over a year) to obtain a search warrant (R. 6-14). Some pertinent testimony of the agent on the petitioner's motion to suppress the evidence was as follows:

Direct Examination of Agent.

"Q. At some time during your investigation prior to the arrest of Mr. Lewis [April, 1965] did the defendant Mr. Lewis become a suspect? A. Yes, he did. . . . I was aware of him as a suspect as far back as 1963." (R. 7.)

"Q. On or about Thursday, December 3, 1964, . . . did you communicate by telephone with the defendant prior to going to his home? A. Yes, sir, I did." (R. 7.)

"Q. Was the purpose of your telephone call on this date, sir, to inquire about the purchase of a quantity of marihuana? A. It was." (R. 7.)

"Q. At the time you went to the defendant's home on December 3d, 1964, did you suspect, from information you had received prior thereto or based on your own personal knowledge or otherwise, that a transaction might take place at the *home* of the defendant so far

as the transfer of marihuana is concerned? A. I did." (R. 8.)

"Q. When you went to the *home* of the defendant on December 3d and on December 17th, Mr. Cass, did you not go there for the *purpose* of obtaining narcotics from him? A. I did." (R. 8.)

"Q. When you went to the defendant's home on December 3d and December 17th, 1964, Mr. Cass [the agent], did you have a search warrant for that purpose? A. I did not." (R. 8.)

"Q. On said date, December 3d and December 17th, 1964, Mr. Cass, did you pose as someone other than the federal officer that you are? A. I did . . ." (One "Pollock," operating a bar and grille in Rhode Island.) (R. 7.)

The petitioner's motion to suppress the evidence was denied and he was found guilty.

Reasons for Granting the Writ.

1. The decision of the Court of Appeals is in conflict with the decision of the Supreme Court.

In the lengthy and clearly defined language of *Gouled* v. *United States,* 255 U.S. 298, relied upon by the petitioner, Mr. Justice Clark, speaking for the Court, wrote that ". . . *entrance* to the *home* or office of a person suspected of crime . . . obtained by a representative of any branch or subdivision of the Government of the United States *by stealth* . . . or in . . . *guise* . . . whether the owner be present or not . . . falls within the scope of the prohibition of the Fourth Amendment . . ." (P. 306.) (Emphasis supplied.)

2. The decision of the Court of Appeals is erroneously based on a decision which is not in point with the issue at bar.

In reaching its decision the Court of Appeals relies solely on the case of *United States* v. *Pasquinzo* (6 Cir., 1964), 334 F. 2d 74, which, although it touches on disguise, *does not deal with the entrance into the home.* In the *Pasquinzo* case the purchase of narcotics takes place in a *drug store,* a place of business open to the public, and as such is clearly distinguishable here.

The Court of Appeals has also misinterpreted the facts of the *Gouled* case, *supra,* in its opinion, by indicating that the entrance into the office was for a "proper purpose." Quite to the contrary, the *entrance* was made by "stealth" for the purpose of acquiring evidence, as it was in the case at bar.

Furthermore, the reference to *Escobedo* v. *United States* (1964), 378 U.S. 478, as it appears in the opinion, was not cited by the petitioner in connection with the illegal entry, but rather dealt with the subsequent negotiations between the agent and the petitioner after the agent already had obtained enough evidence to arrest the petitioner, and did not advise him of his rights.

3. The decision of the Court of Appeals is in conflict with the constitutional rights of the petitioner to be secure in his home.

To enlarge the police power to this extent would be tantamount to permitting a federal officer *to enter* the *home* of a citizen *without a search warrant* in the disguise of the milkman, dry cleaner, or even a member of the clergy, for the purpose of obtaining evidence, spying or any other reason that suited the purpose.

4. The issue is of important constitutional significance and is one which ought to be clarified and settled. It has not yet been decided on this point by the Supreme Court.

There is law in the United States District Court for Massachusetts which follows the *Gouled* case; see *United States* v. *Reckis,* 119 F. Supp. 687. Up to now the only lawful manner to enter the home of a citizen by a federal officer has been by virtue of either a search warrant or an arrest warrant, to be in hot pursuit or by express invitation of the occupant. An invitation procured by fraud is not an invitation. *United States* v. *Reckis, supra.*

Where the question is repeatedly arising currently, the issue of police power versus constitutional rights is squarely on the table. Is a man's home really his castle, or is he losing ground?

5. The evidence is not in dispute.

Conclusion.

It is therefore respectfully requested that this petition for a writ of certiorari to the United States Court of Appeals for the First Circuit be granted.

Respectfully submitted,

S. MYRON KLARFELD,
20 Pemberton Square,
Boston 8, Massachusetts,
Counsel for Petitioner.

Appendix.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 6610.

DUKE LEE LEWIS, A/K/A LEE D. LEWIS,
DEFENDANT, APPELLANT,
v.
UNITED STATES OF AMERICA,
APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Before ALDRICH, *Chief Judge*, HASTIE* and McENTEE, *Circuit Judges*.

S. Myron Klarfeld, for appellant.

Edward J. Lee, Assistant U. S. Attorney, with whom *W. Arthur Garrity, Jr.*, United States Attorney, was on brief, for appellee.

OPINION OF THE COURT.

November 10, 1965.

PER CURIAM. Defendant, convicted of selling marihuana to a government agent who had misrepresented his identity,

*Sitting by designation.

claims an unlawful search and seizure because, thus misled by the agent, he invited him to his home and there made the sales. The happy days for law violators that this claim would produce are not to be. This is not a case of a government agent gaining access for an apparently proper purpose in order to seize surreptitiously evidence of a prior crime, *Gouled* v. *United States,* 1921, 255 U.S. 298, but is one in which the agent was invited for precisely the purpose for which he went. Short of entrapment, not here maintainable, defendant can no more assert that he would not have opened the door to the agent than he can assert that he would not have made the sale. His reliance upon *Escobedo* v. *United States,* 1964, 378 U.S. 478, is quite misplaced. *United States* v. *Pasquinzo,* 6 Cir., 1964, 334 F. 2d 74.

Affirmed.

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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 811

DUKE LEE LEWIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 7-8) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on November 10, 1965. The petition for a writ of certiorari was filed on December 9, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the act of an undercover agent in going to petitioner's home, at petitioner's invitation, to consummate a sale of marihuana constituted an unlawful search and seizure.

STATEMENT

Petitioner, who waived a jury trial, was convicted in the United States District Court for the District of Massachusetts of two sales of marihuana and was given concurrent sentences of imprisonment for five years. The conviction was affirmed on appeal (Pet. 7-8).

The evidence showed that an undercover agent was given petitioner's name as a person who would sell him marihuana (R. 8). The agent, using an assumed name, telephoned petitioner and said that he had heard petitioner had "some pretty good grass" (R. 10, 50). Petitioner said he could take care of the matter and gave the agent his address and directions as to how to get there (R. 10). At petitioner's apartment, petitioner told the agent that, if the agent became a regular customer, he would give him six instead of five bags for $50 (R. 12). The agent paid petitioner $50 and was directed to a package on the porch wrapped in newspapers. The agent left, taking with him the package which contained five envelopes of marihuana (R. 12).

About two weeks later, the agent called and said he wanted to pick up six bags for $50 (R. 11). Petitioner again directed the agent to come over (R. 11).

At the apartment, the agent gave petitioner $50 for a package which contained six bags of marihuana (R. 13).

ARGUMENT

Petitioner's sole contention, raised in a motion to suppress before trial and subsequently renewed, is that the agent's entry into his apartment in an undercover capacity to purchase marihuana constituted an illegal search and seizure in violation of the Fourth Amendment. However, as the court below pointed out, the agent was in petitioner's apartment at petitioner's express invitation for the purpose of making a purchase. The fact that the agent did not reveal his undercover capacity does not amount to a violation of petitioner's right of privacy. See *Lopez* v. *United States*, 373 U.S. 427, 438 where this Court held that an agent was not guilty of an unlawful invasion of the defendant's office "simply because his apparent willingness to accept a bribe was not real."

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

THURGOOD MARSHALL,
Solicitor General.

FRED M. VINSON, JR.,
Assistant Attorney General.

BEATRICE ROSENBERG,
Attorney.

DECEMBER 1965

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Supreme Court of the United States.

OCTOBER TERM, 1965

No. 36

DUKE LEE LEWIS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITIONER'S REPLY BRIEF TO THE BRIEF IN OPPOSITION FOR THE UNITED STATES.

S. MYRON KLARFELD,
20 Pemberton Square,
Boston 8, Massachusetts,
Counsel for Petitioner.

ADDISON C. GETCHELL & SON, INC., LAW PRINTERS, BOSTON.

REPLY

BRIEF

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Supreme Court of the United States.

OCTOBER TERM, 1965.

No. 811.

DUKE LEE LEWIS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITIONER'S REPLY BRIEF TO THE BRIEF IN OPPOSITION FOR THE UNITED STATES.

Argument.

I. The sole case relied upon by the respondent, *Lopez* v. *United States,* 373 U.S. 427, 438, not only fails to support the position of the respondent, *but is not in point.*

The present case deals with the right of a federal officer in disguise to enter the petitioner's home having previously initiated and procured his invitation by deception for the express purpose of soliciting a crime and obtaining evidence to be used against the petitioner, *all without the benefit of a search warrant* which he could have obtained and had ample time to do so (R. 7, 8).

In the *Lopez* case, *supra,* the federal agent was not in disguise and was rightfully on the premises in his official capacity as a revenue agent, all known to the owner (de-

fendant), who then initiated and attempted to bribe the officer (the crime for which he was convicted).

II. The respondent in its opposing brief (p. 2) clearly points out the *undisputed fact* that the federal officer in this case sought out the petitioner, originated and solicited his fraudulent invitation (without a search warrant) and, by this deceptive practice, gained entrance to the home of the petitioner for the purpose of obtaining evidence to be used against him and to solicit a crime—the very practice which was held unconstitutional in *Gouled* v. *United States,* 255 U.S. 298, and which has been updated by reference in the *Lopez* case, *supra.*

III. Finally, the fact that the respondent here and the Court of Appeals have both failed to support their positions and both have relied upon *different* cases, *neither* of which is in point, should be a strong indication that this question ought be answered. Furthermore, it appears to the petitioner that the question, which involves the constitutional right of every citizen to be secure in his home from such improper police practices, should be reviewed by the Supreme Court. Such practices are all too familiar in other forms of government, but are fatal to the most fundamental concepts of personal freedom as guaranteed by our democracy.

Respectfully submitted,

S. MYRON KLARFELD,
20 Pemberton Square,
Boston 8, Massachusetts,
Counsel for Petitioner.

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Supreme Court of the United States.

OCTOBER TERM, 1966.

No. 36.

DUKE LEE LEWIS,
Petitioner,

v.

UNITED STATES OF AMERICA.

BRIEF FOR PETITIONER.

S. MYRON KLARFELD,
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ADDISON C. GETCHELL & SON, INC., LAW PRINTERS, BOSTON.

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Supreme Court of the United States.

OCTOBER TERM, 1966.

No. 36.

DUKE LEE LEWIS,
Petitioner,
v.
UNITED STATES OF AMERICA.

BRIEF FOR PETITIONER.

Opinion Below.

No opinion was rendered in the District Court and the brief opinion of the United States Court of Appeals for the First Circuit is printed in the record (R. 41, 42).

Jurisdiction.

The judgment of the Court of Appeals for the First Circuit was entered on November 10, 1965, and the jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

Questions Presented.

1. Can a federal officer avoid the necessity of obtaining a search warrant and gain entrance to the *home* of one suspected of a crime by disguising himself and gaining entrance by means of stealth, fraud and deception for the

purpose of soliciting a crime and obtaining evidence to be used against the owner?

2. Is the Fourth Amendment to the Constitution of the United States violated when a federal officer, without a search warrant, disguises himself and gains entrance to the *home* of one suspected of a crime by means of stealth, fraud and deception for the purpose of soliciting a crime and obtaining evidence and does so?

3. Should the petitioner's motion to suppress evidence have been allowed?

4. Did the Court of Appeals for the First Circuit err in affirming the judgment of the District Court?

Constitutional Provisions Involved.

The Fourth Amendment to the Constitution provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Statement of Case.

The petitioner stands convicted on two counts of violating Title 26, U.S.C., § 4742(a), of the Narcotics Law involving the transfer of marihuana.

Eleven days prior to the trial a hearing was held on the petitioner's motion to suppress the only evidence obtained by the government and used at his trial (R. 4, 5). At the hearing on said motion the testimony showed that on De-

cember 3, 1964, a federal narcotics agent, disguised and posing as a restaurant operator from Rhode Island known as "Jimmy the Pollock" (R. 8, 11), made a telephone call to the home of the petitioner for the purpose of arranging to purchase a quantity of marihuana from him in his home (R. 7, 8); that the agent, *so disguised and by stealth and without a search warrant, entered the home* of the petitioner on December 3, 1964 (and again by the same method on December 17, 1964), *for the purpose of soliciting this crime* and to *obtain evidence,* which he did, *which* evidence *was used against him* at the time of his trial (R. 7, 8, 9, 10); that the agent did these things after suspecting the petitioner of such conduct for over a year prior to December 3, 1964 (R. 7, 8); that the petitioner was not arrested until four months later (April 27, 1965, R. 10); and that, prior to going to the home of the petitioner, the agent had personal knowledge and other information that a transfer would probably take place at the home of the petitioner (R. 8).

The pertinent testimony of the undercover agent on direct examination went as follows:

> "Q. At some time during your investigation prior to the arrest of Mr. Lewis did the defendant Mr. Lewis become a suspect?
>
> "A. Yes, he did.
>
> "Q. Can you tell us when in time that was, Mr. Cass?
>
> "A. Yes, sir. It began in 1963." (R. 7.)
>
> . . . . . .
>
> "Q. On or about Thursday, December 3d, 1964, as alleged in the indictment, did you communicate by telephone with the defendant prior to going to his home?
>
> "A. On December 3d?

"Q. Yes.

"A. Yes, sir, I did." (R. 7.)

. . . . . .

"Q. Was the purpose of your telephone call on this date, sir, to inquire about the purchase of a quantity of marihuana?

"A. It was.

"Q. On said date, December 3d and December 17th, 1964, Mr. Cass, did you pose as someone other than the federal officer that you are?

"A. I did.

"Q. And whether or not you represented yourself to the defendant on those occasions that you were one Pollock, operating a bar and grille, perhaps, in Rhode Island?

"A. That's correct." (R. 8.)

. . . . . .

"Q. When you went to the defendant's home on December 3d and December 17th, 1964, Mr. Cass, did you have a search warrant for that purpose?

"A. I did not.

"Q. At the time you went to the defendant's home on December 3d, 1964, did you suspect, from information you had received prior thereto or based on your own personal knowledge or otherwise, that a transaction might take place at the home of the defendant so far as the transfer of marihuana is concerned?

"A. I did.

"Q. When you went to the home of the defendant on December 3d and on December 17th, Mr. Cass, did you not go there for the purpose of obtaining narcotics from him?

"A. I did." (R. 8.)

. . . . . .

"Q. On or about Thursday, December 17th, 1964, prior to going to the home of the defendant did you communicate with him by telephone?

"A. I did.

"Q. And was this communication also concerning the possibility of procuring some marihuana from the defendant?

"A. It was.

"Q. When you went to the defendant's home the second time, Mr. Cass, on December 17th, 1964, did you not have enough evidence to arrest him at that particular time and charge him with the same crime for which he is charged today?

"A. I did." (R. 9.)

. . . . . .

"Q. When you went to the defendant's home the second time on December 17th, 1964 did you advise him of his right to have counsel before he answered any questions or entered into any conversation with you?

"A. On the 17th?

"Q. Yes.

"A. No, sir, I did not.

"Q. And on either visit, either the visit of December 3d or December 17th, did you advise the defendant of any of his constitutional rights insofar as they related to the matters with which he is charged today?

"A. I did not.

"Q. When, to the best of your recollection, after December 17th, 1964 did you arrest the defendant?

"A. On the 27th of April, 1965." (R. 9, 10.)

At the conclusion of the hearing the motion to suppress evidence was denied (R. 15) and the motion was renewed at the commencement of the trial, eleven days later, and

again denied after the conclusion of the trial that same day (R. 15, 16). The evidence was not in dispute, the defendant was found guilty, sentenced accordingly (R. 16, 17), and the only question presented here is whether the evidence was obtained in violation of the Fourth Amendment.

The judgment was appealed to the United States Court of Appeals for the First Circuit and was affirmed (R. 42).

Argument.

I.

The petitioner urges that this case falls squarely within the scope and prohibition of *Gouled* v. *United States,* 255 U.S. 298 (1921), which holds that entry into the home procured by stealth or deception to obtain evidence falls within the prohibition of the Fourth Amendment and which case has been updated by citation in recent decisions of this court—*Ker* v. *California,* 374 U.S. 23 (1963), and *Lopez* v. *United States,* 373 U.S. 427 (1963), to mention but a few.

It is interesting to note that the Commonwealth of Massachusetts recognized and followed the law of *Gouled* in *United States* v. *Reckis,* 119 F. Supp. 687 (1954).

There is no dispute that the entrance into the petitioner's home was gained by "stealth," as that term was used in the *Gouled* case (where a government officer entered the defendant's office in the guise of a business caller), as it was in the *Reckis* case (where the government officer entered onto the defendant's land in the guise of a fellow employee and said "the boss sent me down to fix the still"), as it was in *United States* v. *Cook,* 213 F. Supp. 568 (D.C. Tenn., 1962) (where the government officer entered onto the defendant's land by hiding in the trunk of an automobile), and as it was in *Gatewood* v. *United States,* 209 F. 2d 789 (1953) (where the government officers gained entrance

to the defendant's apartment by stating they were from "Western Union").

In each instance the courts have based their decisions on the invasion of the privacy of the home without a proper warrant for such a purpose, and have held this to be a violation of the Fourth Amendment. In no instance can it be said that any invitation by the defendants in the above cases under such deceptive circumstances constituted a waiver of any of their rights under the Fourth Amendment. The petitioner could not improve on the language of these decisions, and urges this Court to continue to follow these cases and rule that the entry into the home of the petitioner as previously stated constituted a violation of his rights under the Fourth Amendment, and that the evidence so obtained should have been suppressed on his motion.

II.

Another line of argument which lends itself to this case deals with the doctrine that the right of privacy, especially in the "constitutionally protected area of the home" should not be invaded without a proper warrant unless the case falls into some exceptional situation of "urgent emergency." *McDonald* v. *United States,* 335 U.S. 451 (1948). *Johnson* v. *United States,* 333 U.S. 10 (1948). *Rios* v. *United States,* 364 U.S. 253 (1960). *Jones* v. *United States,* 362 U.S. 257 (1960). The court discusses some of these extreme instances, such as a situation where a shot is heard and is followed by a cry for help, or when in hot pursuit of a felon who seeks refuge into a home, or where the entrance and search accompanies a valid arrest. But none of these "extreme circumstances" are presented here, more especially where the petitioner has been a suspect for over a year prior to the entrance into his home by the agent (R. 7, 8).

The telephone call to the petitioner's home by the agent in this case is surely more remote in time and circumstance (so as to require a warrant) than the incident surrounding the entry made in *Johnson* v. *United States,* 333 U.S. 10 (1948), where the agent, detecting the smell of opium in the corridor, entered the premises and arrested the defendant without a warrant. Such action was held by this court to violate the Fourth Amendment.

III.

Still another approach to the question can be found in the class of case which holds that the determination as to *when* to invade the privacy of the home is to be separated from the law-enforcement agencies by a magistrate in order to prevent the merger of police power with the judiciary. Such a merger "would obliterate one of the most fundamental distinctions between our form of government, where officers are under the law, and the police-state where they are the law." *Johnson* v. *United States, supra,* p. 17.

The doctrine is again clearly spelled out by this court in *Jones* v. *United States,* 362 U.S. 257 (1960), wherein it was stated that, "In a doubtful case, when the officer does not have clearly convincing evidence . . . it is most important that resort be had to a warrant, so that the evidence in the possession of the police may be weighed by an independent *judicial officer,* whose decision, *not that of the police,* may govern whether liberty or privacy is to be invaded" (pp. 270-271).

Perhaps one of the most significant cases in this area is *Silverman* v. *United States,* 365 U.S. 505 (1961), the famous "spike mike" case, which "holds the line to a fraction of an inch," and clearly demonstrates the extent to which over-zealous law-enforcement officers can and will go if the line is not held. A concurring justice in the *Silverman* case stated that the "technique" of the invasion ought

to require a warrant, and the petitioner in the case at bar urges that this same requirement be established for the "Sneaky Pete Method" of gaining entrance to the home by stealth or deception.

If such an enlargement of police power occurs, then the People could never be certain that the postman, milkman, priest, rabbi or repairman, coming into the home or being met in the street, is not some government agent bent on spying into the privacy of the house or someone's personal affairs whenever and wherever such a meeting takes place.

What great distrust of the government this situation would create among the People!!

IV.

The petitioner realizes that in most instances this type of case must be decided on its own particular facts and further recognizes the long line of significant and controversial cases which have been decided since *Boyd* v. *United States,* 116 U.S. 616 (1886), relating to the question involving search and seizure.

The petitioner feels that it is proper for an undercover agent to pursue the detection of crime without violating the constitutional rights of the citizen, but finds it most untenable, as in this case, where the defendant is sought out in the first instance by a government agent, then tricked in violation of his constitutional rights, solicited and subsequently prosecuted for a crime which the government agent originated and in which he participated in equal measure, and tried with the ill-gotten evidence.

V.

Finally, the petitioner wishes to point out that *United States* v. *Pasquinzo,* 334 F. 2d 74 (1964), relied upon by the Court of Appeals, is distinguishable here in that the place

of purchase in *Pasquinzo* was a drugstore, open to the public, and not in the home of the defendant as in the case at bar, and therefore feels that the Court of Appeals erred in relying thereon.

Conclusion.

For reasons stated above, the petitioner urges that the judgment of the Court of Appeals be reversed.

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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 36

DUKE LEE LEWIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (R. 41–42) is reported at 352 F. 2d 799.

JURISDICTION

The judgment of the court of appeals was entered on November 10, 1965 (R. 42). The petition for a writ of certiorari was filed on December 9, 1965, and granted on January 31, 1966 (R. 43; 382 U.S. 1024). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether it was a violation of the Fourth Amendment for an undercover agent to complete a purchase

of marihuana at petitioner's home without a search warrant after going to the home at petitioner's invitation.

STATEMENT

Petitioner, who waived a jury trial, was convicted in the United States District Court for the District of Massachusetts of transferring marihuana without an order form on December 3, 1964 and December 17, 1964 (R. 3–4, 40). He was given concurrent sentences of imprisonment for five years (R. 16–17).

The only issue concerns the admissibility of the evidence pertaining to the transfer of marihuana in petitioner's home to an undercover agent. Petitioner moved to suppress as evidence the marihuana obtained in his home on the ground that it was illegally seized without a search warrant by an agent who deceived him by posing as an ordinary citizen (R. 4–5). After a hearing (R. 6–15), and at the conclusion of the trial (R. 39–40), the trial court held that the marihuana was transferred voluntarily by a manual transfer and that nothing was taken or seized by the government. The court of appeals affirmed (R. 41–42; 352 F. 2d 799). Finding that the agent was invited to petitioner's home for the purpose of the sale, it rejected petitioner's argument that the misrepresentation of the agent's identity made the transfer an unlawful search and seizure. The pertinent evidence may be summarized as follows:

On December 3, 1964, at about 11 p.m., Edward Cass, a narcotic agent, telephoned petitioner at his home and said "This is Jimmy the Pollack [*sic*]. A friend of ours told me you got some pretty good

grass".[1] Petitioner replied, "Yes, he told me about you, Pollack," and then said, "I believe, Jimmy, I can take care of you." The agent said, "Fine. I want about five bags." Petitioner answered: "Do you know where I live?" When the agent said he did not, petitioner gave his address and directions to his home. Petitioner then said: "Okay, come on right over, it should take you about 15 minutes." The agent knew that grass was a slang term for marihuana (R. 11, 20, 24, 30).

When Cass reached petitioner's home, he knocked on the door. Petitioner opened the door, and the agent said "Duke?" Petitioner said, "Come on in." The agent went into the hallway in the apartment and petitioner closed the door behind him. The agent said, "I'm Jimmy." Petitioner said, "What is that nickname they call you?" The agent answered, "Pollack". They then went into the living room and sat down. Petitioner asked the agent where he came from and what he did. The agent replied that he came from Rhode Island and had a saloon there, and petitioner replied that he, too, owned a saloon. Petitioner then said, "Your stuff is out on the porch, Pollack." During the conversation petitioner agreed to give the agent six instead of five bags for $50 if the agent became a regular customer. The agent paid petitioner $50 and was directed out the front door to

[1] Cass had obtained petitioner's name when he had asked one Richard Gold to put him in touch with somebody from whom he could procure marihuana (R. 31). The government was not permitted to show that prior to December 3, 1964, it had information from other sources about petitioner (R. 36).

a package wrapped in newspaper on the front porch. The agent picked up the package, which contained five bags of marihuana. As he left, he told petitioner that he would see him in about a week (R. 12–13, 22–23).

On December 17, 1964, at about 12:15 a.m., Cass again telephoned petitioner. He said "This is Pollack. I want to pick up six of those bags for $50." Petitioner replied, "Okay, I can take care of you. Come on right over" (R. 11, 26–27). Cass then drove to the house with another agent. Cass knocked on the door and was let in by petitioner. At the front door Cass gave petitioner $50 for a package which contained six envelopes of marihuana. When petitioner reopened the door, he said, "You left your motor running." Cass replied that a friend of his was waiting in the car. Petitioner said he would see Cass later and the agent departed (R. 13, 27). On April 27, 1965, petitioner was arrested (R. 10).

SUMMARY OF ARGUMENT

1. Petitioner's constitutional rights were not violated by the government's use of an undercover agent to discover petitioner's criminal activities. This Court has consistently recognized that it is sometimes necessary for the government to use artifice and stratagem in the detection of crime. The very same Congress which proposed the Bill of Rights enacted laws rewarding informers, and similar statutes have been on the books since that time. The Fourth Amendment is not violated when statements are made by a suspect to a supposed friend who is really a gov-

ernment informant; conversation involves no physical intrusion into the human body and seldom—assuredly not on the facts of this case which raise no suggestion of coercion or pressure—does it concern thoughts which the suspect would like to keep to himself. Nor is the Fifth Amendment violated when there is no element of compulsion. With respect to certain kinds of crimes, the use of informants is the only practical means of apprehending the guilty, and so long as there is no entrapment the government's conduct is permissible.

2. The fact that the transaction in this case was consummated in petitioner's home does not convert the otherwise lawful conduct into a violation of the Fourth Amendment. Petitioner chose to make his home a place of business and he invited the agent to enter it for the purpose of purchasing marihuana. That is all the agent did. The face-to-face conversations between them were not privileged, and they did not become so by reason of the participants' presence in petitioner's home. For petitioner was not relying on the privacy of his home to keep secret what he said to the agent or what he voluntarily transferred to him. The disclosure by the agent was, in short, a breach of petitioner's expectations and not a breach of privacy. This is "the kind of risk we necessarily assume whenever we speak." *Lopez* v. *United States,* 373 U.S. 427, 465 (dissenting opinion of Justice Brennan). The flaw in petitioner's argument becomes the more obvious if one considers its practical consequences. It would result in a rule of privilege that

would immunize criminal activity conducted in the home or office, and would prevent the testimony of informants even though they violated no privacy and did no more than participate in the very activity in which they were invited to engage.

ARGUMENT

THE GOVERNMENT'S UNDERCOVER AGENT DID NOT VIOLATE THE FOURTH AMENDMENT BY CONSUMMATING PURCHASES OF NARCOTICS IN PETITIONER'S HOME AT PETITIONER'S INVITATION

In response to a government agent's telephonic representation that he was "Jimmy the Pollack" who had heard that petitioner had good marihuana for sale, petitioner invited "Jimmy" to his home, told him how to get there, sold him marihuana on the premises, and arranged a discount price for future purchases. The only issue presented to this Court is whether, in these circumstances, the agent obtained the marihuana and petitioner's oral admissions in violation of the Fourth Amendment's guarantee of "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures * * *." We submit that no prohibited invasion of "personal privacy and dignity" (*Schmerber* v. *California,* 384 U.S. 757, 767) is shown by the facts of this case and that there is no basis in the policy of the Fourth Amendment or in the history of its adoption and application for prohibiting conduct of the sort involved here.

Petitioner's claim has two facets, and, to facilitate analysis of the relevant legal issues, we discuss each

of them separately. First is the underlying question whether the government's use of undercover informants—*i.e.*, individuals who engage in deception and stratagem in order to discover evidence (including oral admissions) of crime—is permissible. Second is the issue more squarely argued by the petitioner—whether the Fourth Amendment is violated if an undercover informant speaks to, or has other dealings with, a suspect in a place which is subject to the protections of the Fourth Amendment.

A. THE GOVERNMENT MAY CONSTITUTIONALLY EMPLOY INFORMANTS WHO DISGUISE THEIR IDENTITY OR INTENTIONS IN ORDER TO OBTAIN EVIDENCE OF CRIME

It has long been settled by the decisions of this Court that, subject to appropriate safeguards, the government's use of informants, decoys, and other forms of deception and stratagem in the detection of those engaged in criminal enterprises is a legitimate investigative technique. See, *e.g.*, *Grimm* v. *United States*, 156 U.S. 604, 610–611; *Goode* v. *United States*, 159 U.S. 663, 669; *Rosen* v. *United States*, 161 U.S. 29, 42; *Andrews* v. *United States*, 162 U.S. 420, 423; *Price* v. *United States*, 165 U.S. 311, 315; *Olmstead* v. *United States*, 277 U.S. 438, 468; *Sorrells* v. *United States*, 287 U.S. 435, 441; *Sherman* v. *United States*, 356 U.S. 369, 372; *Masciale* v. *United States*, 356 U.S. 386. As observed in *Sorrells* v. *United States*, *supra*, 287 U.S. at 441: "Artifice and stratagem may be employed to catch those engaged in criminal enterprises." See, also, the concurring opinion of Justice Roberts, *id.* at 453–454. As the present Chief Justice

stated in *Sherman* v. *United States, supra,* 356 U.S. at 372: "Criminal activity is such that stealth and strategy are necessary weapons in the arsenal of the police officer."

Referring specifically to informers, the Second Circuit, in *United States* v. *Dennis,* 183 F. 2d 201, 224, affirmed on a different issue, 341 U.S. 494, summarized the relevant law and its underlying rationale in the following pertinent language (per Learned Hand, J.):

> Courts have countenanced the use of informers from time immemorial; in cases of conspiracy, or in other cases when the crime consists of preparing for another crime, it is usually necessary to rely upon them or upon accomplices because the criminals will almost certainly proceed covertly. Entrapment excluded, of which there was none here, decoys and other deception are always permissible.

Earlier, in *Olmstead* v. *United States, supra,* 277 U.S. at 468, this Court had similarly pointed out that testimony by persons who have pretended to become parties to criminal enterprises, and given themselves every appearance of actively collaborating in the unlawful activities, *"for the purpose of securing evidence,"* "has always been received" (emphasis added). See, also, *Wellman* v. *United States,* 227 F. 2d 757, 770 (C.A. 6), vacated on other grounds, 354 U.S. 931; *Blanchard* v. *United States,* 40 F. 2d 904 (C.A. 5), certiorari denied, 282 U.S. 865.

The admissibility of such testimony has never been discussed in constitutional terms, but we think it plain

that the use of undercover informants to obtain evidence, including oral admissions, offends neither the Fourth nor the Fifth Amendment. As a historical matter, it is clear that the use of government informants is as old as the Bill of Rights. The First Congress enacted a statute making misprision of treason and felony a crime. Sections 2 and 6 of the Crimes Act, 1 Stat. 112, 113. The legal duty to report the commission of known felonies was thereby imposed on any person who had learned that such crimes had been committed. Indeed, the First Congress—which also proposed the Bill of Rights—enacted a statute encouraging certain kinds of informants by awarding to them the penalties assessed upon those found guilty of the crimes about which information was given. Act of July 31, 1789, Sec. 38, 1 Stat. 29, 48. And various statutes since that time have provided for similar rewards to informants. See, *e.g.*, Act of March 3, 1797, 1 Stat. 506; 21 U.S.C. 183; 25 U.S.C. 201; 31 U.S.C. 232(E)(1). See also *United States ex rel. Marcus* v. *Hess*, 317 U.S. 537; *Marvin* v. *Trout*, 199 U.S. 212, 225; *United States* v. *Murphy*, 16 Pet. 203. There is no meaningful difference, from the standpoint of governmental participation, between the case of the individual who is requested by government agents to report what a suspect says to him and the case of an individual who engages in the same conduct in response to a general statutory offer of a reward.

The Fourth Amendment has no application to the use of informants, as such, because when an informant hears what is said to him and reports it to the

government, he is not seizing what he has heard in violation of a right to be secure in "persons, houses, papers, and effects." The person who has disclosed information to him has not had his privacy invaded; he has voluntarily chosen to communicate with another. An *amicus curiae* brief filed in *Osborn* v. *United States,* No. 29, this Term, asserts that privacy is invaded when the services of an informant are used by the government because a suspect's inner thoughts are thereby deceptively elicited (ACLU *Amicus* Br. No. 29, p. 6). What this assertion overlooks, however, is that, more often than not, a statement made to a pretended confederate or friend is not really the expression of an "inner thought" which the speaker wishes to keep to himself and only reluctantly discloses; it is usually a voluntary communication which the speaker affirmatively wants the auditor to hear. This case presents a most striking illustration, for it is entirely clear that it required no persuasion whatever for petitioner to utter his incriminating statements. Petitioner said what he did not as a result of any efforts to "ferret out * * * inner thoughts" (ACLU *Amicus* Br. No. 29, p. 6) but because his statements were the means of furthering the offense which he wished to commit. In short, petitioner was not interested in keeping secret the words he uttered; his desire was to communicate them to anyone who was a cash buyer of marihuana.

Physical instrusions into the human body are, to be sure, subject to the limitations of the Fourth Amendment. *Schmerber* v. *California,* 384 U.S. 757, 767–

770. But ordinary face-to-face conversation involves no physical intrusion, cannot be considered a "search" in the ordinary meaning of the term, and surely does not "depend antecedently upon seizures of 'persons' * * *." *Schmerber* v. *California, supra,* 384 U.S. at 767. If learning "inner thoughts" constitutes an unlawful search of a person within the meaning of the Fourth Amendment, the same should be true of the coerced extraction of a confession—obviously an expression of "inner thoughts." Yet it has never been suggested that a coerced confession amounts to a violation of the Fourth, as contrasted with the Fifth, Amendment. But even were it otherwise a conversation could hardly be considered an *unreasonable* search when unaccompanied by any suggestion of coercion or pressure.

Turning to the Fifth Amendment, it has never been suggested that obtaining information through a ruse from one who is not in custody or subjected to any form of coercion constitutes compulsion within the meaning of the Fifth Amendment's self-incrimination clause. This Court was careful, for example, to restrict its holding in *Miranda* v. *Arizona,* 384, U.S. 436, to "custodial interrogation" (384 U.S. at 444) because "the compelling atmosphere inherent in the process of in-custody interrogation is not necessarily present" (384 U.S. at 478) when the individual being interrogated retains his freedom of action. Suspects who have not been arrested may, of course, be as ignorant of their rights as those who have, but their statements have not then been "compelled" within the

meaning of the Fifth Amendment. Similarly, persons not in custody may be beguiled or betrayed by those to whom they reveal confidences, but such deception does not mean that their statements have been obtained in violation of constitutional right. As Justice Brennan stated in *Lopez* v. *United States,* 373 U.S. 427, 465 (dissenting opinion), the risk of being "betrayed by an informer or deceived as to the identity of one with whom one deals is probably inherent in the conditions of human society."

This is particulary true when, as in this case, in *Osborn,* No. 29, this Term, and in *Hoffa,* Nos. 32–35, this Term, the statements so obtained are not mere admissions of past crimes but declarations in furtherance of a criminal scheme or a disclosure of a criminal conspiracy which is then and there pursuing its unlawful objective. For the self-incrimination provision of the Fifth Amendment does not bar the use of declarations which were part of the criminal scheme being prosecuted. Such statements are not "testimonial" any more than silent acts by which the offense is committed. Cf. *Schmerber* v. *California,* 384 U.S. 757, 763–765.

There is similarly no substance to the claim epitomized by the assertion of the American Civil Liberties Union as *amicus curiae* in *Hoffa et al.* v. *United States,* Nos. 32–35, this Term, that the use of government informants is "the hallmark of a police state" (ACLU *Amicus* Br., No. 32, p. 14). Whether government activity smacks of a "police state" turns on the nature of the information which the government

seeks to obtain. If informants are asked to report to government officials matters which are within the legitimate sphere of speech and association, as was true in the regimes of Nazi Germany or Stalinist Russia, the dangers of a "police state" are real indeed. The framers of our Constitution, who were not unaware of that evil in light of the then recent experiences of John Wilkes in England,[2] secured the inhabitants of this nation against such practices by guaranteeing freedom of speech and association in the First Amendment. See, *e.g., National Association for the Advancement of Colored People* v. *Alabama,* 357 U.S. 449; *Bates* v. *Little Rock,* 361 U.S. 516; *Gibson* v. *Florida Legislative Comm.,* 372 U.S. 539. The right thus secured does not, however, extend to information concerning illegal activity. Whatever may be the code of the underworld, there is nothing reprehensible in informing law-enforcement authorities about plans to commit murder, treason, kidnapping, or even of schemes to transfer narcotics or corruptly to influence jurors. Nor is there anything ignoble in the government's encouragement of informants of this kind, particularly in cases where the offense has not yet been committed. Government surely has an obligation to protect the law-abiding—the obligation to apprehend and convict offenders and to prevent the commission of crimes whenever possible. And "[i]t is an act of responsible citizenship for individuals to give whatever information they may have to aid in

[2] See 2 May, *Constitutional History of England* (1891 ed.) pp. 247–248, 275–276.

law enforcement." *Miranda* v. *Arizona*, 384 U.S. 436, 477–478. See also *In re Quarles and Butler*, 158 U.S. 532, 535–536.[3]

The importance of informants in law enforcement has been emphasized not merely by police officers and those engaged in the prosecution of crime [4] but also by the leading advocates of reform of the criminal law. The Reporters of the Model Penal Code commented upon their proposed entrapment provisions (ALI, Model Penal Code, Tentative Draft No. 9, p. 16):

> 2. *The Definition of Entrapment in the Present Law.* The principal difficulty in defining the police conduct which gives rise to the defense has lain in the fact that some tactics employing misrepresentation and persuasion are necessary to successful police work and ought not to be forbidden. In many cases the need for techniques of this sort clearly overbalances the risk of inducing offending by the innocent. Particularly, in the enforcement of vice, liquor or narcotics laws, it is all but impossible to obtain evidence for prosecution save by the use of decoys. There are rarely complaining witnesses.

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[3] "It is the right, as well as the duty, of every citizen, when called upon by the proper officer, to act as part of the *posse comitatus* in upholding the laws of his country. It is likewise his right and his duty to communicate to the executive officers any information which he has of the commission of an offence against those laws; and such information, given by a private citizen, is a privileged and confidential communication, for which no action of libel or slander will lie, and the disclosure of which cannot be compelled without the assent of the government."

[4] See, *e.g.*, Harney & Cross, *The Informer in Law Enforcement* (1960), pp. 6–12.

> The participants in the crime enjoy themselves. Misrepresentation by a police officer or agent concerning the identity of the purchaser of illegal narcotics is a practical necessity. Cooperation with the criminal and something less than absolute truth is required in many other kinds of cases where the police have an "inside man" in a group of would-be lawbreakers. Therefore, the law must attempt to distinguish between those deceits and persuasions which are permissible and those which are not.

Since, for the reasons we have stated, the use of informants, as such, raises no questions under the Fourth Amendment, there is no basis for the suggestion made by the *amicus* in *Osborn* v. *United States,* No. 29, this Term, that "probable cause" or some other objectively demonstrable quantum of proof be required before the government may use the services of an informant. In practice, such a requirement would seriously hamper legitimate investigation of the most serious offenses. Obviously the opportunities for establishing probable cause are much slimmer before an offense is committed than after. Yet if law enforcement officials are trying, as they were in *Osborn* and *Hoffa,* to anticipate criminal attempts and to prevent their success, they would, under such a rule, be almost helpless to do so by means of the most effective preventive method—*i.e.,* receiving reports from a pretended confederate. Compare *Trupiano* v. *United States,* 334 U.S. 699. And even where the purpose of the officials is not to prevent the success of a criminal endeavor but to provide an opportunity,

for one who is so disposed, to commit an offense under circumstances which will result in the offender's conviction, there is often no time for presentation of evidence to a magistrate. Must an undercover narcotics agent who picks up information bit by bit and makes purchases on a street where the narcotics trade is prevalent retire to a judge's chambers before each street corner transaction? Such a proposal, we submit, violates common sense and is not in keeping with the realistic demands of the Fourth Amendment.

There are, of course, important limits to the deception in which government informants may engage. With these limitations, which are found primarily in the body of law relating to entrapment, we have no quarrel whatever. We agree that it is the function of the law enforcement officer to detect crime and not to create it. The courts should indeed examine the conduct of the informer to satisfy themselves that he did not induce the offense; and that of the defendant to be assured that he was in fact disposed to its commission. *Sorrells* v. *United States,* 287 U.S. 435; *Sherman* v. *United States,* 356 U.S. 369. "[A] line must be drawn between the trap for the unwary innocent and the trap for the unwary criminal," *Sherman* v. *United States, supra,* 356 U.S. at 372.

"However, the fact that government agents 'merely afford opportunities or facilities for the commission of the offense does not' constitute entrapment." *Ibid.,* quoting from *Sorrells* v. *United States,* 287 U.S. 435. Moreover, the range of conduct in which the informant may engage must vary with the circum-

stances. An agent who has infiltrated a conspiratorial organization which is dedicated to violent retaliation upon members of a particular race, for example, may be forced to pretend that he will take an active part in a particular unlawful venture simply to learn the full nature of the plot. And in uncovering violations of the narcotics, liquor or gambling laws, government agents must take on the guise of prospective customers if they are to discover who is guilty. The degree of participation by an undercover agent must necessarily be a matter of judgment, based on the particular situation as it develops. The on-the-spot decisions which must commonly be made do not lend themselves to the delays involved in obtaining the antecedent judgment of a magistrate on how far to go.

On the facts of this case, it is quite clear not only that entrapment was not an issue (no claim of entrapment was made in the district court), but that the deception was minimal and that there was no effort to induce conduct in which petitioner would not ordinarily engage. Plainly, the agent did not importune the petitioner or resort to psychological or other pressures. He represented that he was a customer who wished to buy and petitioner promptly responded by indicating his immediate readiness to deal. That the petitioner was already involved in a criminal course of conduct is evident not only from his response but from the fact that he had his stock-in-trade on hand. Certainly, the mere fact that the agent made the overture—an essential step if agents

are to ferret out secret traffic in narcotics and other forms of contraband—does not constitute entrapment or any other violation of protected rights. *Masciale* v. *United States,* 356 U.S. 386.

B. A GOVERNMENT INFORMANT DOES NOT VIOLATE THE FOURTH AMENDMENT MERELY BECAUSE HIS DEALINGS WITH THE SUSPECT TAKE PLACE IN THE LATTER'S HOME

We turn now to the question whether decisive constitutional significance attaches to the circumstance that dealings between a government informant and a suspect take place in the suspect's home. Petitioner in this case, like the petitioners in *Hoffa et al.* v. *United States,* Nos. 32–35, this Term, contends that his privacy was invaded by the agent's deceptive entry into his home. The short answer, on the facts of this case, is that petitioner chose to open his home, as a place of business, to any purchaser of marihuana. He is not in a position to invoke the sanctity of his home when the person to whose presence he objects entered at his invitation for precisely the purpose for which petitioner had invited him—*i.e.,* to purchase narcotics—and did no more while he was there than carry out that common objective. Petitioner's real objection is not that the agent was present in his home and purchased marihuana there, but that he dealt with the intention of reporting what had occurred to law-enforcement authorities.

Petitioner's contention rests on a fundamental misapprehension concerning the guarantees of the Fourth Amendment. That constitutional provision does not protect individuals from breaches of trust; it does not cloak with a privilege against disclosure anything said

or done in a home. The shield which the Fourth Amendment erects around a home is designed to keep out unwanted intruders, not to silence those who have been invited to enter.

The circumstances which prompted the proposal and passage of the Fourth Amendment—the use of the general warrant in England and writs of assistance in the Colonies, the decision in *Entick* v. *Carrington,* 19 How. St. Tr. 1029, and the attack on writs of assistance by James Otis—have been too frequently discussed in opinions of this Court to justify their repetition here. See *Boyd* v. *United States,* 116 U.S. 616, 624–629; *Harris* v. *United States,* 331 U.S. 145, 157–161 (dissent); *Frank* v. *Maryland,* 359 U.S. 360; *Marcus* v. *Search Warrant,* 367 U.S. 717, 724–729. See also Lasson, *The History and Development of the Fourth Amendment.* What history demonstrates, however, is that the principal concern of the framers of the Fourth Amendment was to protect the individual against excessive and unreasonable use of governmental power; to insure that government agents would not be able to use their official authority to gain unjustified entry to a home or to engage in a sweeping and indefinite search. This paramount purpose is demonstrated by the fact that the Amendment, as originally drafted, was no more than a prohibition against general warrants. It did not, at first, contain any prohibition upon unreasonable searches and seizures. See Lasson, *op. cit. supra,* at 100–102.

In the form it was ultimately adopted, however, the Amendment protects "persons, houses, papers, and effects" against more than forcible intrusions.

This Court held in *Gouled* v. *United States*, 255 U.S. 298, that what the government could not do, consistently with the Fourth Amendment, by force could not be done by stealth or deception. The agent in this case could not, in other words, disguise himself as a "postman, milkman, priest, rabbi or repairman" (Pet. Br. 9) and then ransack petitioner's home in order to find where the marihuana was hidden. The vice in such conduct is that it invades the privacy of the home; it discloses matter which the occupant of the home intended to keep secret and which he entrusted to the privacy of his dwelling.

Petitioner, on the other hand, was not relying on the privacy of his home to keep secret what he said to the agent and what he did in the agent's presence (except to the extent that he did not want *third parties* to overhear or observe). His statements were intended for the agent's ears and he placed his faith entirely in the agent's trustworthiness. The agent's disclosure of indiscreet revelations which petitioner made to him and acts committed by petitioner in his presence bears no relationship, legal or logical, to the place where the statements were made or the acts were committed. The effect of disclosure would be precisely the same if the transaction had occurred in the street, in a restaurant, or, indeed, if petitioner had visited the agent at the latter's home. If the transaction had occurred in the agent's home, the same statements would have been made and the same quantity of marihuana would have been transferred. But petitioner would not have had even an ostensible basis for claiming that the privacy of his home had been invaded.

The flaw in petitioner's argument is his failure to recognize that the alleged deceptive invasion of his home was unrelated to the harm he suffered, and that it, in fact, resulted in no violation of privacy whatever. It is on that ground that this Court, apparently unanimously, rejected a similar contention in *Lopez* v. *United States,* 373 U.S. 427. The Court held in *Lopez* that Davis, the internal revenue agent who pretended to collaborate in the defendant's effort to bride him (373 U.S. at 438),

> was not guilty of an unlawful invasion of petitioner's office simply because his apparent willingness to accept a bribe was not real. * * * He was in the office with petitioner's consent, and while there he did not violate the privacy of the office by seizing something surreptitiously without petitioner's knowledge. * * * The only evidence obtained consisted of statements made by Lopez to Davis, statements which Lopez knew full well could be used against him by Davis if he wished. * * *

It is important to note that what divided the Court in the *Lopez* case was not the claim that Davis personally had violated the Fourth Amendment by entering Lopez' office without disclosing his real intentions. Indeed, Mr. Justice Brennan's dissent in *Lopez* (joined in by Justices Douglas and Goldberg) fully supports our position in the present case that the agent's personal testimony concerning petitioner's statements to him was admissible notwithstanding the fact that the statements were made in a home to which the agent was admitted only because he misstated his

identity and it was not known that he would report to the government. The dissent states (373 U.S. at 450):

> On Lee assumed the risk that his acquaintance would divulge their conversation; Lopez assumed the same risk *vis-à-vis* Davis. The risk inheres in all communications which are not in the sight of the law privileged. It is not an undue risk to ask persons to assume, for it does no more than compel them to use discretion in choosing their auditors, to make damaging disclosures only to persons whose character and motives may be trusted. * * *

Referring to the government's argument in *Lopez* that if the agent's relatively innocuous conduct in that case were found offensive "the whole gamut of investigatorial techniques involving more serious deception" would also have to be condemned, with the consequence that police officers could "no longer employ confidential informants, act as undercover agents, or even wear 'plain clothes'," Justice Brennan stated (373 U.S. at 465; emphasis added):

> [T]his argument misses the point. *It is not Agent Davis' deception that offends constitutional principles,* but his use of an electronic device to probe and record words spoken in the privacy of a man's office. For there is a qualitative difference between electronic surveillance, whether the agents conceal the devices on their persons or in walls or under beds, and conventional police stratagems such as eavesdropping and disguise. The latter do not so seriously intrude upon the right of privacy. *The risk of being overheard by an eavesdropper or betrayed by an informer or deceived as to the*

> *identity of one with whom one deals is probably inherent in the conditions of human society. It is the kind of risk we necessarily assume whenever we speak.* * * *[5]

In short, there has been no dissent in this Court from the view that statements made to a government informant in the quarters of the declarant, to which the declarant has invited the informant, may be received in evidence (without impinging on any right of the declarant grounded in the Fourth Amendment) through the testimony of the informant himself. See, also, *Blanchard* v. *United States*, 40 F. 2d 904 (C.A. 5), certiorari denied, 282 U.S. 865; *Bush* v. *United States*, 283 F. 2d 51 (C.A. 6), certiorari denied, 364 U.S. 942. *Silverman* v. *United States*, 365 U.S. 505, on which

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[5] Similarly, what divided the Court in *On Lee* v. *United States*, 343 U.S. 747, was not whether Chin Poy, the old-acquaintance-turned-informer, could properly testify to statements which *he* heard On Lee make in On's laundry (the government did not offer Chin Poy as a witness), but whether the narcotics agent, stationed outside with the receiving set, could testify to the statements, as broadcast by the transmitter concealed on Chin Poy. Mr. Justice Burton's dissent, in which Justice Frankfurter joined, made specifically clear the view of those Justices that "Chin Poy, who was lawfully in petitioner's room could have testified as to what he, himself, saw or heard there." 343 U.S. at 766. Similarly, Judge Frank's dissent in the Second Circuit (*On Lee* v. *United States*, 193 F. 2d 306, 316) recognized that the Fourth Amendment "does not safeguard a man from such errors in judging the character of those whom he lets into his house." See also *Trupiano* v. *United States*, 334 U.S. 699, 701–702, 706, where this Court assumed that an agent who had accepted employment at an illicit still in the guise of a "dumb farm hand" could properly supply information forming the basis of a "detailed and effective search warrant."

petitioner relies (Pet. Br. 8–9), is plainly distinguishable because the intrusion there was by an eavesdropper, an outsider to the conversations—precisely the kind of person whom the occupants of the dwelling were seeking to exclude by conversing privately in their home. *Gouled* v. *United States,* 255 U.S. 298 (Pet. Br. 6), is also distinguishable because the government agent who furtively stole documents which the owner did not intend him to see (much less to take) was disclosing by stealth something which the occupant of the office had intended to keep to himself and had secreted in a private office. *Gouled* would be comparable to this case if the occupant of the office had invited the caller-informer to visit him and then, believing that the caller was a friend of his, had *given* him the documents to keep. See also our brief in *Hoffa et al.* v. *United States,* Nos. 32–35, this Term, pp. 131–132.

The explicit invitation made by petitioner in this case plainly distinguishes the facts here from those of the other cases cited in petitioner's brief (Pet. Br. 6). Moreover, in all of the cases cited, government agents entered premises under affirmatively false representations in order to observe what was being done in the privacy of those protected enclosures. The agent in the present case entered petitioner's home because that, fortuitously, is where petitioner wanted to consummate the sale of narcotics. The agent was not, in other words, interested in intruding into a home to hear or observe private conversations or private acts; he was interested only in face-to-face dealings

with petitioner at any location petitioner would choose.[6]

In short, this case involves the exercise of no governmental power to intrude upon protected premises; the visitor was invited and willingly admitted by the suspect. It concerns no design on the part of a government agent to observe or hear what was happening in the privacy of a home; the suspect chose the location where the transaction took place. It presents no question of the invasion of the privacy of a dwelling; the only statements repeated were those that were willingly made to the agent and the only things taken were the packets of marihuana voluntarily transferred to him. The pretense resulted in no breach of privacy; it merely encouraged the suspect to say things which he was willing and anxious to say to anyone who would be interested in purchasing marihuana.

We turn finally to the practical consequences of the rule urged by petitioner. We submit that if facts such as these were held to constitute a violation of

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[6] It is true that in this case there was an element of deception which was not present in *Osborn* and in *Hoffa*—the agent concealed his true name and represented himself as "Jimmy the Pollack." But petitioner did not admit him to his home because he believed his name was "Jimmy" rather than Edward. The misrepresentation as to identity did not, in other words, assist the agent in entering the protected premises. The only relevant representation was that he was a *bona fide* purchaser of marihuana, and it was on the basis of this assertion that petitioner dealt with the agent. The added strategem of calling himself "Jimmy the Pollack" was used only to buttress the credibility of the representation that the agent was truly interested in purchasing marihuana.

the Fourth Amendment, the consequences for law enforcement would be severe. In the narcotics business, for example, where large quantities of contraband require little space, it would encourage peddlers to convert their homes into places of business, and sell all their goods indoors. They would then be secure in the knowledge that no government agent could permissibly negotiate a purchase. And since undercover purchases are the principal means by which narcotics dealers are apprehended, traffickers would inevitably be aided in their illicit operations. The consequences would be hardly less serious if the government were permitted to use passive deception (*i.e.*, failure to disclose an intention to inform), but not active deception (*i.e.*, disguised identities). For then it could rely only upon informants whom a suspect actually knew—not a wholly trustworthy group—but could not corroborate the informant's information by using its own agents, in whose reliability it is justly entitled to place more credence.

Nor would the effects of any such rule be confined to narcotics cases. Numbers operators can conduct their businesses in home or office. Moonshiners can negotiate with customers and employees indoors. Counterfeiters not infrequently set up their presses in the basements of dwellings. Bribers are able to discuss illicit ventures exclusively in offices, homes, and cars. Unlawful conspirators can plot their crimes in the houses of their most firmly committed members.

We submit that nothing in the history or philosophy of the Fourth Amendment justifies the conclusion that

it was intended to make the home a sanctuary for crime, impenetrable to a government agent who does not use his governmental authority to gain entry, violates no privacy, and does no more than what the occupant has invited him to do. The rule advocated by petitioner would give the Fourth Amendment the effect which this Court, speaking through Mr. Justice Douglas, squarely repudiated in *McDonald* v. *United States,* 335 U.S. 451, 455–456—it would "make the home a safe haven for illegal activities."

CONCLUSION

For the foregoing reasons, we respectfully submit that the judgment below should be affirmed.

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Supreme Court of the United States.

OCTOBER TERM, 1966.

No. 36.

DUKE LEE LEWIS

v.

UNITED STATES.

PETITION FOR REHEARING.

Now comes Duke Lee Lewis, petitioner in the above matter, and moves for a rehearing, and sets forth as his reasons therefor—

I.

The opinion and decision of the Court have omitted the most important issue presented by the case, namely: What excuses a Federal officer from obtaining a search warrant when he goes to the home of a suspected criminal and gains entrance by deception for the purpose of obtaining evidence to be used against him, having previously had sufficient time and probable cause to obtain a search warrant?

The opinion, as it presently stands with this question unanswered, will open the door for law-enforcement officials to use deception rather than the search warrant to gain entrance to those places for which the search warrant has been intended. *Trupiano* v. *United States,* 334 U.S. 699, 701-702, 706 (Government Brief, p. 23), relied upon by the Government, clearly illustrates that getting information by guise can be used as a "basis for a detailed search war-

rant." Can the Government now obtain by deception that for which the search warrant had been intended? In its present form the opinion answers this question in the affirmative. Petitioner does not believe that this was the intention of the Court.

II.

The Court, in distinguishing the facts of *Gouled* v. *United States,* 255 U.S. 298, has not recognized the principle laid down, namely that it is the *fraudulent entry* by a Government agent that violates the Fourth Amendment. Agreeably the evidence was secretly carried away, but the prohibition of the Fourth Amendment as set forth in *Gouled* is against Governmental intrusion by fraud and *without* a search warrant. The petitioner believes that it was not the intention of the Court to overrule what has been the law since 1921.

III.

There is no evidence to support the characterization of the petitioner's home as a "commercial center" for illegal activities to which outsiders are invited, other than the transactions made by the Government agent. While the petitioner does not deny these two transactions, it is quite clear that, *until* the Government agent went to the home and made his "buy," it cannot be said that this was a prior practice of the petitioner. It is also to be remembered that it was the Government that initiated the events leading up to the sale; it was the Government that made the initial telephone call; it was the Government that made the request to buy. This situation is very much like: Which came first, the chicken or the egg? This matter ought to be put right.

IV.

The effect of the majority opinion and the opinion expressed by Justice Brennan, with whom Judge Fortas has concurred, that the petitioner can "waive his right to privacy in the premises" is repugnant to the doctrine of long standing that one cannot waive a constitutional right unless he fully understands and knows that he is doing so. Clearly the decision as it stands now indicates that a citizen can be *tricked* into waiving a constitutional right. Petitioner does not believe that this was the intention of the Court.

Argument.

For the foregoing reasons the petitioner urges that he may be granted a rehearing in order that the opinions of the Court may be clarified for future generations.

If it is the intention of the Court to rule that, when a person invites a Government agent in disguise to his home for the purpose of committing a crime, such an invitation excuses the Government from resorting to a search warrant, then such language should be made blatantly clear as being the law of the *Lewis* case.

The majority opinion is based upon the home being a "commercial center," which does not happen in time until *after* the agent makes a fraudulent entry and his buy. The opinion of Justice Brennan says that you can trick a citizen into waiving his constitutional rights. The petitioner feels that these two matters are totally inconsistent with the law, and not intended by the Court. If the conviction is to stand, then let it stand on firm ground; and therefore

the petitioner prays that his motion be granted for the purpose of clarification.

DUKE LEE LEWIS,
By his Attorney,
S. MYRON KLARFELD.

Certificate of Counsel.

I, S. Myron Klarfeld, attorney for the petitioner, Duke Lee Lewis, aver that the foregoing petition is presented in good faith and not for delay.

S. MYRON KLARFELD,
Attorney for the Petitioner.

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SUPREME COURT OF THE UNITED STATES

No. 36.—October Term, 1966.

Duke Lee Lewis, Petitioner, v. United States. | On Writ of Certiorari to the United States Court of Appeals for the First Circuit.

[December 12, 1966.]

Mr. Chief Justice Warren delivered the opinion of the Court.

The question for resolution here is whether the Fourth Amendment was violated when a federal narcotics agent, by misrepresenting his identity and stating his willingness to purchase narcotics, was invited into petitioner's home where an unlawful narcotics transaction was consummated and the narcotics were thereafter introduced at petitioner's criminal trial over objection thereto. We hold that under the facts of this case it was not. Those facts are not disputed and may be briefly stated as follows:

On December 3, 1964, Edward Cass, an undercover federal narcotics agent, telephoned petitioner's home to inquire about the possibility of purchasing marihuana. Cass, who previously had not met or dealt with petitioner, falsely identified himself as one "Jimmy the Pollack" and stated that a mutual friend had told him petitioner might be able to supply marihuana. In response, petitioner said, "Yes. I believe, Jimmy, I can take care of you," and then directed Cass to his home where, it was indicated, a sale of marihuana would occur. Cass drove to petitioner's home, knocked on the door, identified himself as "Jim," and was admitted. After discussing the possibility of regular future dealings at a discounted price, petitioner led Cass to a package lo-

cated on the front porch of his home. Cass gave petitioner $50, took the package, and left the premises. The package contained five bags of marihuana.[1] On December 17, 1964, a similar transaction took place, beginning with a phone conversation in which Cass identified himself as "Jimmy the Pollack" and ending with an invited visit by Cass to petitioner's home where a second sale of marihuana occurred. Once again, Cass paid petitioner $50, but this time he received in return a package containing six bags of marihuana.[2]

Petitioner was arrested on April 27, 1965, and charged by a two-count indictment with violations of the narcotics laws relating to transfers of marihuana. 26 U. S. C. § 4742 (a). A pretrial motion to suppress as evidence the marihuana and the conversations between petitioner and the agent was denied, and they were introduced at the trial. The District Court, sitting without a jury, convicted petitioner on both counts and imposed concurrent five-year penitentiary sentences. The Court of Appeals for the First Circuit affirmed, 352 F. 2d 799, and we granted certiorari, 382 U. S. 1024.

Petitioner does not argue that he was entrapped, as he could not on the facts of this case;[3] nor does he contend that a search of his home was made or that anything other than the purchased narcotics was taken away. His only contentions are that, in the absence of a war-

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[1] In the illegal narcotics trade, an average "bag" of marihuana contains approximately five grams of marihuana. The five bags transfered to the agent by petitioner, however, contained a quantity of marihuana measuring 31.16 grams.

[2] The six bags transfered in this second transaction contained 40.34 grams of marihuana.

[3] Compare *Sherman* v. *United States*, 356 U. S. 369 (1958), and *Sorrells* v. *United States*, 287 U. S. 435 (1932). See generally Mikell, The Doctrine of Entrapment in the Federal Courts, 90 U. Pa. L. Rev. 245 (1942).

rant, any official intrusion upon the privacy of a home constitutes a Fourth Amendment violation and that the fact the suspect invited the intrusion cannot be held a waiver when the invitation was induced by fraud and deception.

Both petitioner and the Government recognize the necessity for some undercover police activity and both concede that the particular circumstances of each case govern the admissibility of evidence obtained by stratagem or deception.[4] Indeed, it has long been acknowledged by the decisions of this Court, see *Grimm* v. *United States*, 156 U. S. 604, 610 (1895), and *Andrews* v. *United States*, 162 U. S. 420, 423 (1896),[5] that, in the detection of many types of crime, the Government is entitled to use decoys and to conceal the identity of its agents. The various protections of the Bill of Rights, of course, provide checks upon such official deception

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[4] In oral argument before this Court, counsel for petitioner conceded that information obtained by the agent in the course of his general undercover investigation, together with the subject matter of the first telephone conversation between the agent and petitioner, provided probable cause for believing that a narcotics offense would be committed in petitioner's home and, therefore, would have supported the issuance of a search warrant. According to counsel, the agent's misrepresentations would not have vitiated a magistrate's determination of probable cause. Counsel further suggested that, if the agent had arrested petitioner at the latter's home and then had conducted a search incidental to the arrest, no constitutional problems would be presented.

[5] Former Chief Justice Hughes commented as follows upon the use of official deception in combating criminal activity:

"Artifice and stratagem may be employed to catch those engaged in criminal enterprises . . . . The appropriate object of this permitted activity, frequently essential to the enforcement of the law, is to reveal the criminal design; to expose the illicit traffic, the prohibited publication, the fraudulent use of the mails, the illegal conspiracy, or other offenses, and thus to disclose the would-be violators of the law." *Sorrells* v. *United States*, 287 U. S. 435, 441–442 (1932).

for the protection of the individual. See, *e. g.*, *Massiah* v. *United States*, 377 U. S. 201 (1964); *Trupiano* v. *United States*, 334 U. S. 699 (1948).

Petitioner argues that the Government overstepped the constitutional bounds in this case and places principal reliance on *Gouled* v. *United States*, 255 U. S. 298 (1921). But a short statement of that case will demonstrate how misplaced his reliance is. There, a business acquaintance of the petitioner, acting under orders of federal officers, obtained entry into the petitioner's office by falsely representing that he intended only to pay a social visit. In the petitioner's absence, however, the intruder secretly ransacked the office and seized certain private papers of an incriminating nature. This Court had no difficulty concluding that the Fourth Amendment had been violated by the secret and general ransacking, notwithstanding that the initial intrusion was occasioned by a fraudulently obtained invitation rather than by force or stealth.

In the instant case, on the other hand, the petitioner invited the undercover agent to his home for the specific purpose of executing a felonious sale of narcotics. Petitioner's only concern was whether the agent was a willing purchaser who could pay the agreed price. Indeed, in order to convince the agent that his patronage at petitioner's home was desired, petitioner told him that, if he became a regular customer there, he would in the future receive an extra bag of marihuana at no additional cost; and in fact petitioner did hand over an extra bag at a second sale which was consummated at the same place and in precisely the same manner. During neither of his visits to petitioner's home did the agent see, hear, or take anything that was not contemplated, and in fact intended, by petitioner as a necessary part of his illegal business. Were we to hold the deceptions of the agent in this case constitutionally prohibited, we would come near to a rule that the use of undercover

agents in any manner is virtually unconstitutional *per se*. Such a rule would, for example, severely hamper the Government in ferreting out those organized criminal activities that are characterized by covert dealings with victims who either cannot or do not protest.[6] A prime example is provided by the narcotics traffic.

The fact that the undercover agent entered petitioner's home does not compel a different conclusion. Without question, the home is accorded the full range of Fourth Amendment protections. See *Amos* v. *United States*, 255 U. S. 313 (1921); *Harris* v. *United States*, 331 U. S. 145, 151, n. 15 (1947). But when, as here, the home is converted into a commercial center to which outsiders are invited for purposes of transacting unlawful business, that business is entitled to no greater sanctity than if it were carried on in a store, a garage, a car, or on the street. A government agent, in the same manner as a private person, may accept an invitation to do business and may enter upon the premises for the very purposes contemplated by the occupant. Of course, this does not mean that, whenever entry is obtained by invitation and the locus is characterized as a place of business, an agent is authorized to conduct a general search for incriminating materials; a citation to the *Gouled* case, *supra*, is sufficient to dispose of that contention.

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[6] "Particularly, in the enforcement of vice, liquor or narcotics laws, it is all but impossible to obtain evidence for prosecution save by the use of decoys. There are rarely complaining witnesses. The participants in the crime enjoy themselves. Misrepresentation by a police officer or agent concerning the identity of the purchaser of illegal narcotics is a practical necessity. . . . Therefore, the law must attempt to distinguish between those deceits and persuasions which are permissible and those which are not." Model Penal Code § 2.10, comment, p. 16 (Tent. Draft No. 9, 1959).

See also Donnelly, Judicial Control of Informants, Spies, Stool Pigeons and Agent Provocateurs, 60 Yale L. J. 1091, 1094 (1951); Note, 73 Harv. L. Rev. 1333, 1338–1339 (1960).

Finally, petitioner also relies on *Rios* v. *United States*, 364 U. S. 253 (1960); *Jones* v. *United States*, 362 U. S. 257 (1960); *McDonald* v. *United States*, 335 U. S. 451 (1948); and *Johnson* v. *United States*, 333 U. S. 10 (1948). But those cases all dealt with the exclusion ev evidence that had been forcibly seized against the suspects' desires and without the authorization conferred by search warrants. A reading of them will readily demonstrate that they are inapposite to the facts of this case; and, in this area, each case must be judged on its own particular facts. Nor is *Silverman* v. *United States*, 365 U. S. 505 (1961), on point. For there, the conduct proscribed was that of eavesdroppers, unknown and unwanted intruders who furtively listened to conversations occurring in the privacy of a house. The instant case involves no such problem; it has been well summarized by the Government at the conclusion of its brief as follows:

> "In short, this case involves the exercise of no governmental power to intrude upon the protected premises; the visitor was invited and willingly admitted by the suspect. It concerns no design on the part of a government agent to observe or hear what was happening in the privacy of a home; the suspect chose the location where the transaction took place. It presents no question of the invasion of the privacy of a dwelling; the only statements repeated were those that were willingly made to the agent and the only things taken were the packets of marihuana voluntarily transferred to him. The pretense resulted in no breach of privacy; it merely encouraged the suspect to say things which he was willing and anxious to say to anyone who would be interested in purchasing marihuana."

Further elaboration is not necessary. The judgment is

Affirmed.

SUPREME COURT OF THE UNITED STATES

No. 36.—October Term, 1966.

Duke Lee Lewis, Petitioner
v.
United States.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit.

[December 12, 1966.]

Mr. Justice Brennan, with whom Mr. Justice Fortas joins, concurring.

While I concur in the Court's judgment, I vote to affirm solely on the reasoning on which the Court ultimately relies, namely that petitioner's apartment was not an area protected by the Fourth Amendment as related to the transactions in the present case.

The Fourth Amendment protects against governmental intrusion upon "the sanctity of a man's home and the privacies of life." *Boyd* v. *United States*, 116 U. S. 616, 630. However, the occupant can break the seal of sanctity and waive his right to privacy in the premises. Plainly he does this to the extent that he opens his home to the transaction of business and invites anyone willing to enter to come in to trade with him. When his customer turns out to be a government agent, the seller cannot, then, complain that his privacy has been invaded so long as the agent does no more than buy his wares. Thus the corner grocery with the living quarters in the rear would not be a protected area as regards the purchase of groceries in the store area, although the living quarters to which shoppers are not privy retain the constitutional immunity. Cf. *Wong Sun* v. *United States*, 371 U. S. 471.

The petitioner in this case opened his apartment for the conduct of a business, the sale of narcotics; the agent, in the same manner as any private person, entered

the premises for the very purpose contemplated by the occupant and took nothing away except what would be taken away by any willing purchaser. There was therefore no intrusion upon the "sanctity" of petitioner's home or the "privacies of life."